



Discussion Paper:

Review of the Police Powers
(Drug Detection Dogs) Act

June 2004

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Foreword

The use of drug detection dogs by NSW Police to detect drugs in certain public places forms an important part of the Government's commitment to the reduction in supply and demand of prohibited drugs in the community. This commitment is complemented by treatment and diversion initiatives for those who currently use drugs.

The power to use drug detection dogs to aid police in the detection of drug offences was clarified and expanded by the *Police Powers (Drug Detection Dogs) Act 2001* (the 'Drug Dogs Act'). The Drug Dogs Act enables police to carry out 'general drug detection' without a warrant in authorised public places such as licensed premises, sporting and entertainment venues, and prescribed public transport routes. Police may also carry out 'general drug detection' in other public places such as streets and shopping centres upon obtaining a warrant pursuant to the Act.

The NSW Parliament has determined that my office review the police use of drug detection dogs for two years. Our review is monitoring whether the Drug Dogs Act is being applied properly, fairly and effectively. We are also canvassing the question of whether the use of drug detection dogs strikes an appropriate balance between the rights of the individual on the one hand and the need to protect the community from prohibited drugs on the other hand.

Our review employs a range of research methodologies including consulting with stakeholders such as police and community groups; direct observation of police using drug detection dogs; inspecting records of police use of the powers; examining court decisions; and analysing complaints. Relevant to any consideration of drug law enforcement strategies is the interface with harm minimisation principles. Our review will endeavour to address this diverse and complex area.

This discussion paper provides some background to the legislation and a basic explanation of its provisions. It outlines a number of issues that have been raised to date and puts forward a non-exhaustive list of questions for your consideration. For the purposes of our review it is important that we are made aware of experiences, impressions and comments - both good and bad - from all persons involved with this legislation so as to ensure that our review is fair, thorough and balanced.

I encourage and look forward to contributions from all those who have an interest in the use of drug detection dogs by police.

A handwritten signature in black ink, appearing to read 'B. A. Barbour', written in a cursive style.

Bruce Barbour
Ombudsman

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Chapter 1. Introduction

The *Police Powers (Drug Detection Dogs) Act 2001 (NSW)* (the 'Drug Dogs Act') commenced on 22 February 2002. The Drug Dogs Act confers powers on police to use drug detection dogs for 'general drug detection'. In particular, the Drug Dogs Act allows police to use drug detection dogs without a warrant to detect drug offences in relation to persons in places such as licensed premises, particular public transport routes and some other entertainment venues. Police may also apply for a warrant to use drug detection dogs to detect drug offences in other public places.

Section 13 of the Drug Dogs Act requires that the NSW Ombudsman scrutinise and report on the initial police use of powers conferred by the legislation.

Over a two-year review period we have inquired into the exercise by police of the powers in the Drug Dogs Act. We have examined police records, spoken to police and other community members and organisations, examined court transcripts, observed police activity and monitored complaints. Our analysis of this information will form the basis of a final report on our activities and findings for the consideration of the NSW Parliament.

This discussion paper sets out a number of issues and invites comment on particular questions. It also provides some background, a basic explanation of the legislative provisions and some initial statistical information about the operation of the legislation during the first 12 months.

We invite you to comment about any aspect of the implementation or operation of the legislation by making a submission to our review.

Your submission may be a formal written document or simply a letter or email. Material from any submissions received will be an important element of our final report. Please note that our report will not refer to individuals by name in relation to any policing incident or event, but we generally attribute comments from submissions to the authors of those comments. If you do not want all or some aspects of your submission to be attributed to you or your organisation, please advise us accordingly. We are also happy to discuss any concerns you may have about confidentiality.

Inquiries about this review should be directed to Emma Koorey on (02) 9286 1003.

Any submissions or correspondence relating to this review should be sent to:

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Or by email to:

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Due date for submissions: Monday 9 August, 2004
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Chapter 2. Background

The Drug Dogs Act commenced in February 2002. It was introduced following a local court decision in *Police v Darby*,¹ a case involving a man charged with two counts of possessing a prohibited drug² in contravention of section 10 of the *Drug Misuse and Trafficking Act 1985*. The magistrate dismissed the charges because she determined that police found the drugs as a result of an 'illegal search'. The defendant was searched because a drug detection dog had indicated that he may be carrying a prohibited substance. There was evidence that the dog had 'nudged' and 'bunted' the man in the course of detecting the odour of an illegal drug and the magistrate determined that the dog's sniffing of the man constituted an illegal search because it had not been performed with 'reasonable suspicion'.³

Notwithstanding that the dog's 'search' was found to be illegal, the magistrate still had a discretion under s138 of the *Evidence Act 1995* to allow evidence of the possession of drugs to be presented in court. In deciding whether to exercise this discretion, the magistrate stated that she must 'balance on the one hand the desirability of preventing the widespread use of prohibited drugs, and on the other the preservation of the civil liberties of the individual'.⁴ The magistrate decided not to allow the evidence, stating:

*The search by the dog was illegal, and the nature of the offence not so criminally serious, yet the gravity in overall social terms of the impropriety so great, that its results should not be admissible as evidence in the face of that breach of personal rights.*⁵

In an appeal by the Director of Public Prosecutions to the Supreme Court of NSW,⁶ Justice O'Keefe found that the magistrate had erred in her finding that the dog's actions constituted an illegal search. As the decision relating to the legality of the search was judged to be erroneous, Justice O'Keefe held that no question of the exercise of discretion under s138 of the Evidence Act arose. The Court of Appeal will hear a further appeal against the Supreme Court decision.⁷ A date for that hearing is yet to be set.

The *Police Powers (Drug Detection Dogs) Bill* ('the Bill') was introduced into the Legislative Council on 6 December 2001 seeking to clarify issues raised in *Police v Darby* about the legal status of police powers to use drug detection dogs.⁸ By 14 December 2001 the Bill had been passed by both houses of Parliament and received the Governor's assent.

The Drug Dogs Act commenced on 22 February 2002. The *Police Powers (Drug Detection Dogs) Regulation* (the 'Drug Dogs Regulation') was proclaimed under s 11 of the Drug Dogs Act and commenced operation on 10 May 2002.

¹ *Police v Darby* (unreported), Downing Centre Local Court, 21 November, 2001

² 2.89g methylamphetamine and 1.9g cannabis leaf.

³ The *Drug Misuse and Trafficking Act 1985*, s37 (4) requires that prior to conducting a search of a person, police reasonably suspect that the person has possession of a prohibited substance in contravention of the Act.

⁴ *DPP v Darby* [2002] NSWSC 1157.

⁵ *DPP v Darby* [2002] NSWSC 1157.

⁶ *DPP v Darby* [2002] NSWSC 1157.

⁷ *Glen Paul Darby v Director of Public Prosecutions*, File no: 041237/02, lodged 23/12/2002.

⁸ The Opposition had earlier proposed its own version of the Bill in the form of the *Drug Misuse and Trafficking Amendment (Sniffer Dogs) Bill* in November 2001.

The provisions of the Drug Dogs Act

The Act confers powers on police to use drug detection dogs to detect prohibited drugs and plants. It authorises a police officer to use a drug detection dog if the police officer is already authorised to search a person for the purpose of detecting a drug offence.⁹ For example, if a police officer has a reasonable suspicion that a person is committing a drug offence, the officer may use a drug detection dog to assist with the search of the person. The Drug Dogs Act also specifies that if police are entitled to enter premises (for instance, to execute a search warrant) they may be accompanied by a drug detection dog for the purpose of detecting a drug offence.¹⁰

The Drug Dogs Act also sets out provisions for police to use drug detection dogs for 'general drug detection'. General drug detection is defined as:

*. . . the detection of prohibited drugs or plants in the possession or control of a person, except during a search of a person that is carried out after a police officer reasonably suspects that the person is committing a drug offence.*¹¹

The Drug Dogs Act confers powers on police to carry out general drug detection without a warrant in relation to specified persons, including:

persons at, or seeking to enter or leave, any part of premises¹² being used for the consumption of liquor that is sold at the premises (other than any part of premises being used primarily as a restaurant or other dining place),

persons at, or seeking to enter or leave, a public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held,

*persons on, or seeking to enter or leave, a public passenger vehicle¹³ that is travelling on a route prescribed by the regulations, or a station, platform or stopping place on any such route.*¹⁴

The routes prescribed under the Drug Dogs Regulation enable drug detection dogs to be used for general drug detection on most of the Cityrail Network and on specified bus routes between Albury and Sydney, and Sydney and Grafton.

The Drug Dogs Act also empowers police to conduct general drug detection in any public place if they obtain a warrant. Police may apply for such a warrant if they have reasonable grounds to believe that 'the persons at any public place may include persons committing drug offences'.¹⁵ The Drug Dogs Regulation sets out the procedures in relation to search warrants obtained according to the Drug Dogs Act.¹⁶

⁹ *Police Powers (Drug Detection Dogs) Act 2001*, s4(1).

¹⁰ *Police Powers (Drug Detection Dogs) Act 2001*, s4(2).

¹¹ *Police Powers (Drug Detection Dogs) Act 2001*, s5.

¹² Premises is defined in s3 of the Act and includes 'any building, structure, vehicle, vessel or aircraft and any public place whether built on or not'.

¹³ s7(2) defines 'Public passenger vehicle' as a train, light rail vehicle or bus that is used to provide a public passenger service.

¹⁴ *Police Powers (Drug Detection Dogs) Act 2001*, s7.

¹⁵ *Police Powers (Drug Detection Dogs) Act 2001*, s8(2).

¹⁶ *Police Powers (Drug Detection Dogs) Regulation 2002*, Part 3.

'Public place' is defined in the Drug Dogs Act.¹⁷ In summary, it includes a place that is open to or used by the public, whether or not on payment of money and whether or not it is only open to a limited class of persons. A public place may be a road but not a school.

The Drug Dogs Act requires police carrying out general drug detection to take reasonable precautions to prevent the dog from touching a person and to keep the dog under control.¹⁸

The Drug Dogs Act also makes clear that it does not confer on police powers to enter any premises that a police officer is not otherwise authorised to enter, or to detain a person that the officer is not otherwise authorised to detain.¹⁹

The Drug Dogs Act does not provide police with a specific power to search a person. The drug detection dogs are used by police as a tool to form a 'reasonable suspicion' that a person is carrying a prohibited substance. The New South Wales Court of Criminal Appeal has explained the meaning of 'reasonable suspicion' as follows:

A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by [the legislation]. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown . . .

What is important is the information in the mind of the police officer stopping the person... at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole surrounding circumstances.²⁰

According to the Attorney General:

The power of the drug detection dogs to identify prohibited drugs by smell is a tool used by the police officer to engage their reasonable suspicion. Once police have a reasonable suspicion that a person possesses prohibited drugs, they can legally carry out a search of the person. A search of the person by a police officer is a justified trespass on the person where such reasonable suspicion exists.²¹

Once police have formed this reasonable suspicion they may then search the person in accordance with s 37(4)(a) of the *Drug Misuse and Trafficking Act 1985*:

A member of the police force may 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...

¹⁷ *Police Powers (Drug Detection Dogs) Act 2001*, s3

¹⁸ *Police Powers (Drug Detection Dogs) Act 2001*, s9.

¹⁹ *Police Powers (Drug Detection Dogs) Act 2001*, s10.

²⁰ *R v Rondo* [2001] NSWCCA 540.

²¹ The Hon. R Debus, MP. Extract from Parliamentary Hansard from Legislative Assembly of 6 December 2001.

Sources of information

The methods we have employed to review the police implementation of the Drug Dogs Act will be set out in our final report. However, it is worth noting that our information sources include:

- Records from the Computerised Operational Police System (COPS);
- Data from spreadsheets and other records held by the NSW Police Dog Unit;
- Complaints and enquiries from members of the public;
- Our observations of police operations using drug detection dogs;
- Analysis of relevant court transcripts;
- Interviews and focus groups with police;
- Interviews of owners and licensees of licensed premises;
- Consultations with community organisations and individuals; and
- Our surveys of members of the public.

We will also make use of the submissions and contributions from individuals and organisations that we receive in response to this discussion paper.

We aim to collect, analyse and evaluate information about the use of drug detection dogs from a range of sources and perspectives.

Chapter 3. The use of drug detection dogs for general drug detection

The Dog Unit

The Dog Unit is a distinct unit within the State Protection Group of NSW Police. It is located at Menai Police Station and is comprised of separate sections for drug detection dogs, firearms and explosives detection dogs, and general purpose dogs.

The drug detection dogs section has 12 operational drug detection dogs and 14 handlers.²² They may be deployed:

- during the execution of search warrants on private premises;
- to assist police in the search of vehicles, buildings or persons when police have a reasonable suspicion that prohibited drugs may be present; and
- for use in general drug detection, with or without a warrant.

Drug detection dogs

All drug detection dogs utilised by the Dog Unit are Labradors. Each handler generally works with a single drug detection dog. With the guidance of the drug detection dog trainer, the handler conducts the initial training of his or her own dog.

The drug detection dogs are trained to identify the odour of illegal drugs and 'indicate' to their handler when the odour is present. In NSW, drug detection dogs are trained using a system of food rewards. In training, and when possible in live operations, dogs are fed and praised by their handler when they detect the odour of an illegal drug. The dogs are only to be fed when they have indicated the presence of an illegal substance. Each dog is allocated a certain amount of food per day. If insufficient food rewards are eaten 'on the job' the dog is to be fed during training exercises conducted by the handler.

The drug detection dogs are known as 'passive' response dogs. Although they may nudge, touch, push past or run towards a person, the dogs are not trained to be aggressive. Contact with members of the public is generally discouraged. We have never observed a drug detection dog to be aggressive in any way.

How are drug detection dogs deployed?

Police deploy the drug detection dogs in a variety of contexts. However, there are common factors that make it possible to provide general descriptions of how the dogs are deployed.²³

²² Advice from Drug Dog Unit, 8 March 2004.

²³ These are based on our discussions with officers from the Dog Unit, the *NSW Police Drug Detection Dogs Management Operational Guidelines*, and observations of police use of the dogs during operations.

Requests from police

Drug detection dogs are only deployed when the Dog Unit receives a request from another NSW Police unit, such as a local area command. If a local command wishes to include a drug detection dog and handler in a local operation, for example, an officer from that command must make a written request to the Dog Unit.²⁴ The request must include enough intelligence about drug supply in particular locations to satisfy the Commander of the Dog Unit that there is significant intelligence to justify use of the use of a drug detection dog in that area.

As part of our review of the implementation of the Drug Dogs Act, we will audit the intelligence records provided as part of requests to the Dog Unit.

The Dog Unit also assesses the requests to ensure that they are consistent with the relevant legislation and internal police guidelines.

The Commander of the Dog Unit is responsible for approving requests for a drug detection dog in metropolitan areas. The commander must consult with the State Protection Group Commander if any requests are declined. The State Protection Group Commander is also responsible for authorising the deployment of drug detection dogs to areas outside the Sydney metropolitan area.

Usually only one drug detection dog will be requested for an operation. However, on some occasions more than one dog is requested and approved.

Police Briefing

Usually all officers involved in an operation utilising a drug detection dog are briefed immediately before the operation. As part of our observational research we have attended 29 such briefings. Typically, the commander of an operation will use the briefing to advise participating officers of:

- the nature and purpose of the operation;
- the areas covered by any search warrant;
- information about any locations or individuals pertinent to the operation;
- the duration of the operation and any meal or other breaks;
- appropriate recording (on COPS or elsewhere) of information about incidents during the operation;
- procedures to be followed for searching, arrest and evidence;
- information about common places where drugs may be secreted on a person;
- tactics for the operation, for example placement of police in premises and timing of police entry to venues.

Often police will also be advised not to rely solely on the drug detection dog, but to also make use of other police powers where appropriate.

The handler also usually speaks to police at the briefing. Handlers explain how the drug detection dog does its job and often provide information about how and when to

²⁴ In emergency situations requests may be made verbally.

record incidents in which people are searched. Handlers commonly stress the following things:

- police should wait for the handler to acknowledge an indication by the drug dog before approaching a person;
- police should thoroughly search a person even if the person hands over a small amount of drugs or admits that they have recently smoked cannabis;
- police should ensure that the handler is not left alone but is always accompanied by several police; and
- to keep in mind the privacy of persons searched.

Police operations

The way police run operations using a drug detection dog varies slightly depending on the location of the operation, its purpose and the decisions of the police officer commanding the operation. However, by and large, the police operations we have observed have had many similarities.

Street patrol operations

To use the drug detection dog on a public street, police must first have obtained a warrant under section 8 of the Drug Dogs Act. The warrant will specify the areas where the drug detection dog may be used and the dates and times during which the dog may be used.

Generally, the handler and drug detection dog will walk ahead of other police involved in the operation. Usually, a couple of officers will try to stay close to the handler and other police may spread out. The drug detection dog walks beside or in front of the handler. If the dog indicates a person, that person may be searched on the spot or taken to a nearby but slightly more private position. For example, if a person is on a busy street when indicated by the drug detection dog, police may take the person around the corner into a quieter side street to conduct the search in an area with fewer passers-by.

Operations at railway stations and trains

Police may use drug detection dogs on railway stations or trains along most CityRail routes without obtaining a warrant. Police often patrol in station ticketing areas and on station platforms. When a train arrives the handler will often position the dog in a place where passengers pass the dog to exit the railway station. Once a person is indicated by a drug detection dog, the person might be searched on the spot, or police might conduct the search in nearby toilets, a room allocated for police use, or another area of the station away from public view.

Sometimes police will patrol a train while it is stationary at the platform. Alternatively, they might patrol the train as it travels between stations. The handler will usually direct the drug detection dog through the train in a

systematic manner to maximise the number of passenger areas screened. If the drug detection dog indicates a particular passenger, the passenger may be searched on the train or police may escort the passenger from the train to conduct a search at the next station.

The following is an extract from the narrative section of a police event record on COPS.

Western Sydney, December 2002, 5.20pm²⁵

About 5.20pm on Friday [date], police were conducting [operation name] at [name of railway station] utilising the drug detection dog. The dog indicated that the POI²⁶ [name] had a drug in his possession.

The POI was arrested and taken to a room out of the public view where he was searched. A small plastic bag containing Cannabis was found in his backpack.

The defendant stated it was Cannabis and he didn't pay anything for it. The drug was weighed in the presence of the POI coming to a total of 0.8 grams. The POI was eligible for a Cannabis Caution and was issued with [caution number]. The drug was placed in [bag number] and sealed in the presence of the POI.

The POI was released from police custody.

Operations involving licensed premises

Police do not need a warrant to use drug detection dogs at licensed premises. Once in the premises, it is common for one police officer to speak with the manager or licensee of the premises. Sometimes police will also conduct a licensing check²⁷ while they are at the premises. If the venue is very crowded, dark and loud, this can present difficulties for the handler and the drug detection dog. Sometimes handlers will not take their dogs into particularly crowded premises.

If a drug detection dog makes an indication of a person in a pub or club, police generally conduct the search:

- in a quiet or more private area of the venue;
- in the toilets; or
- outside the premises.

Our observations have shown that it is less common for police to search the person 'on the spot' if the drug detection dog indicates a person in the busier areas of licensed premises – although it does occur sometimes.

The following is an example of a search we observed after a drug detection dog indicated a person on licensed premises.

²⁵ Event record 1.

²⁶ POI is an acronym for 'person of interest'.

²⁷ A check that the establishment is meeting the requirements of liquor licensing laws.

Inner Sydney, November 2002, 1.45am²⁸

The drug detection dog indicated a man playing a poker machine.

The man was taken outside to a fairly quiet side street. He was asked for his full name and gave his details to police. Three police questioned him – two male and one female.

When asked, the man told police his date of birth. The man's English appeared to be quite poor. He appear[ed] to understand only a little of what was going on.

The man's pockets were turned out by a male police officer. The officer shined a torch in the man's pockets and looked down the back of the man's jeans, also using the torch.

The man was then asked whether he had anything in his underpants but appeared not to understand. He was asked to take his shoes off and complied. He was also asked to take off his socks and did so. Police examined his shoes and socks. Two people walked past. One police officer asked the man, "Have you taken drugs tonight?" and he replied "No, never. Why take drugs?" He was thanked by police who then departed.

Operations at dance parties

Police may use drug detection dogs without a warrant at dance parties. To date we have observed two police operations at dance parties. One dance party had a number of indoor dance venues and a large outdoor area with stalls, food outlets and areas to 'hang out'. At that operation, police patrolled the queues of people seeking to enter the party as well as outdoor areas using the drug detection dog. Police informed us that police had been hired on a 'user pays' basis to patrol inside the dance venues. If the drug detection dog indicated a person, police generally either took the person to a more private area of the grounds or took the person to a room allocated for police use to search the person. Rarely was a person searched where the indication occurred.

At the second dance party operation we observed, police only searched persons in a room allocated for this purpose. Persons found in possession of drugs were not allowed back into the party.

Indications by drug detection dogs

During a police operation, a drug detection dog will often sniff at objects on the ground or people passing by. Handlers tell us that this sniffing can be distinguished from the behaviour of the dog when it detects the odour of a prohibited substance. Although each drug detection dog behaves slightly differently, a typical indication would involve the dog sniffing near a person and then sitting down next to them. Occasionally, the dog's nose may touch a person or their property.

Justice O'Keefe's description, in *DPP v Darby*,²⁹ of that drug detection dog's behaviour is informative:

²⁸ Ombudsman observer notes, November 2002.

²⁹ [2002] NSWSC 1157.

The evidence established that Rocky [the drug detection dog] had been trained to detect the scent of cannabis. When he did so his training caused him to put his nose in the air, flair his nostrils, and sniff rapidly. He would then follow the scent to its source. When he reached the source of the scent, he was trained to put his nose on such source and sit down beside it. If the scent emanated from a person's pocket, Rocky was trained to put his nose on the pocket and then sit down beside the person.

Some handlers have said that their drug detection dog becomes 'excited' when it detects the odour of a substance in the air. Handlers can pick up the behavioural signs exhibited by their dog when the dog is in the presence of an illegal substance.

Our observations indicate that the initial indication of a person happens quickly. After the indication, the handler will almost always explain to the person what has happened and give the person a 'criminal caution'. The Management Operational Guidelines advise that when a person is stopped because of a positive indication by a drug detection dog, the handler should say:

I am constable . . . from the New South Wales Dog Unit. This is a drug detection dog that has indicated the scent of an illegal substance emitting from you. I want you to understand that you do not have to say or do anything unless you wish, but anything you say or do may later be given in evidence, do you understand that?³⁰

Our observations indicate that a search in which a person is compliant with police requests and which results in no illegal substances being found, usually takes about five minutes.

The following two descriptions of initial contact between a drug detection dog and handler, and a member of the public have been taken from our observational research.

Northwestern Sydney, December 2002, 1.25pm

The drug detection dog indicated a man of approximately 25 to 35 years of age, past the ticket gates at the top of the stairs leading down to the platform. The handler said to the man:

This is a drug detection dog. He's just picked up the scent of an illegal substance coming from your person.

The handler then cautioned the man. The handler gave the caution quite quickly and the man asked 'what?' The handler repeated the caution. Local police then escorted the man to an area to be searched.

Western Sydney, November 2002, 10.58pm

The drug detection dog, handler and other police entered the pub. The first room of the pub was fairly quiet. There were six people at a table drinking and about 10 people around the bar. The dog indicated one man standing at the bar. The handler explained to the man:

The dog's indicated the presence of a prohibited drug coming from you at the moment.

The handler then cautioned the man.

³⁰ New South Wales Police Drug Detection Dogs Management Operational Guidelines, January 2002, p. 9.

After this initial contact the handler will usually move the drug detection dog away and other police will step forward to conduct the search.

Chapter 4. Summary of information

A useful measure of where and when the drug detection dogs were used for general drug detection is the Dog Unit's own records on the number of times its dogs indicated the presence of drugs. From 22 February 2002 to 21 February 2003 the drug detection dogs made an indication of the presence of an illegal substance on 4078 occasions.³¹ On almost all of these occasions a person was searched as a result of the drug dog's indication.³²

It is important to note that an indication by a drug detection dog does not always lead to the discovery by police of an illegal substance.

When were the drug detection dogs used?

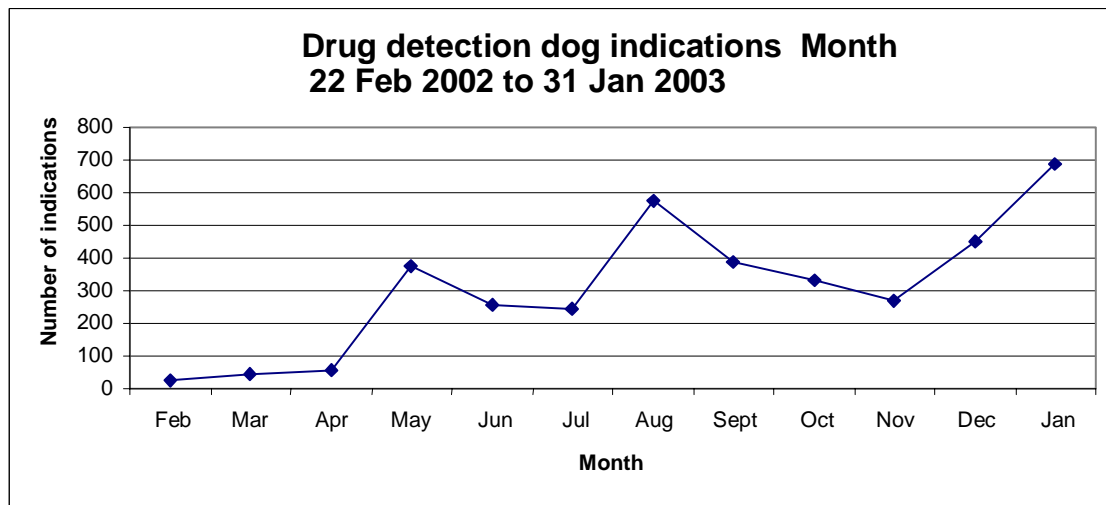
Data for the 12 months immediately following commencement of the Drug Dogs Act indicates that police use of the dogs for 'general drug detection' work increased markedly in that period.

Although the Drug Dogs Act commenced on 22 February 2002, the Drug Dogs Regulation did not commence until 10 May 2002. The Drug Dogs Regulation permits use of drug detection dogs without a warrant on specified rail and bus routes, greatly expanding the situations where drug detection dogs could be used. This is likely to be a significant factor in the sharp rise in indications from 57 for April to 376 in May.

Figure 1

Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003

* Note that data for February 2002 is for indications following the commencement of the Drug Dogs Act on 22 February 2002. The number of indications from 1 to 21 February 2003 was 379.



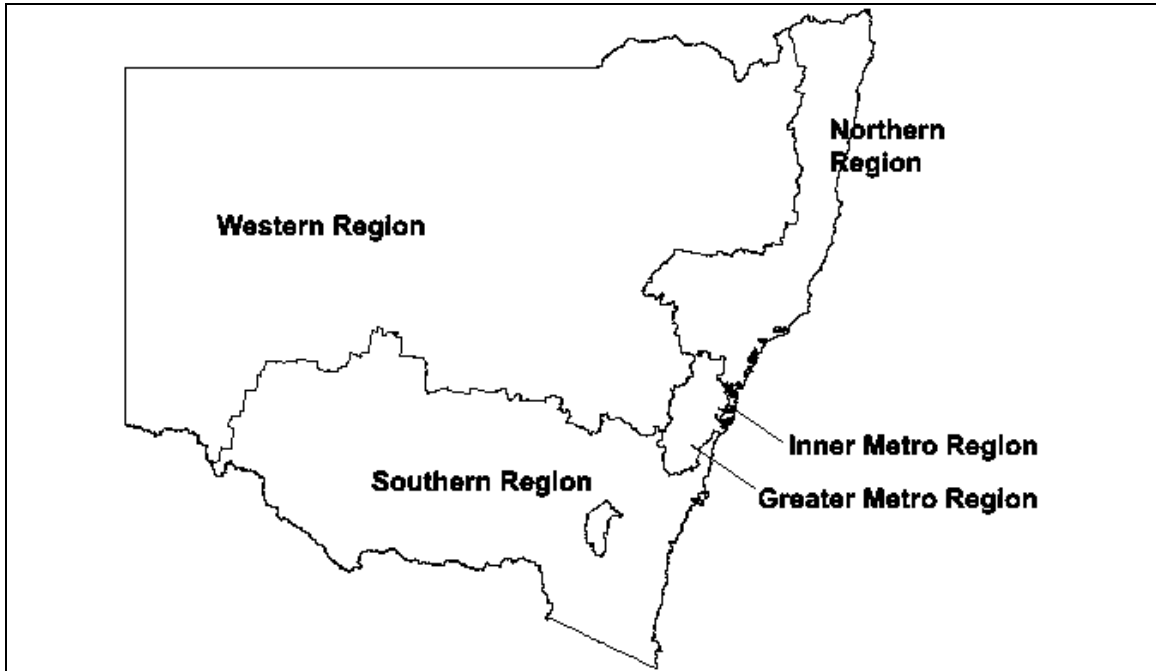
Where were drug detection dogs used?

By far the majority of drug dog indications occurred during police operations in two NSW Police regions, 46% in Greater Metropolitan and 32% in Inner Metropolitan.

³¹ For an explanation of these statistics and their limitations see Appendix A "About the statistics".

³² On a small number of occasions a vehicle, building or property may have been searched.

The map below indicates the areas included in each NSW Police region.



The table below shows the number of drug detection dog indications according to the NSW Police region in which they occurred.

Table 1: Drug detection dog indications by NSW Police region

Source: NSW Police Dog Unit Master Spreadsheet, 22 February 2002 to 21 February 2003

Region	Number of Drug Dog Indications	
Greater Metropolitan	1925	46%
Inner Metropolitan	1309	32%
Northern	469	12%
Southern	354	9%
Western	21	1%
Total	4078	100%

From 22 February 2002 to 21 February 2003, drug detection dogs were used in 136 localities. The table below lists the suburbs and towns where drug dogs most frequently made indications.

Table 2: Drug detection dog indications by suburb

Source: NSW Police Dog Unit Master Spreadsheet, 22 February 2002 to 21 February 2003

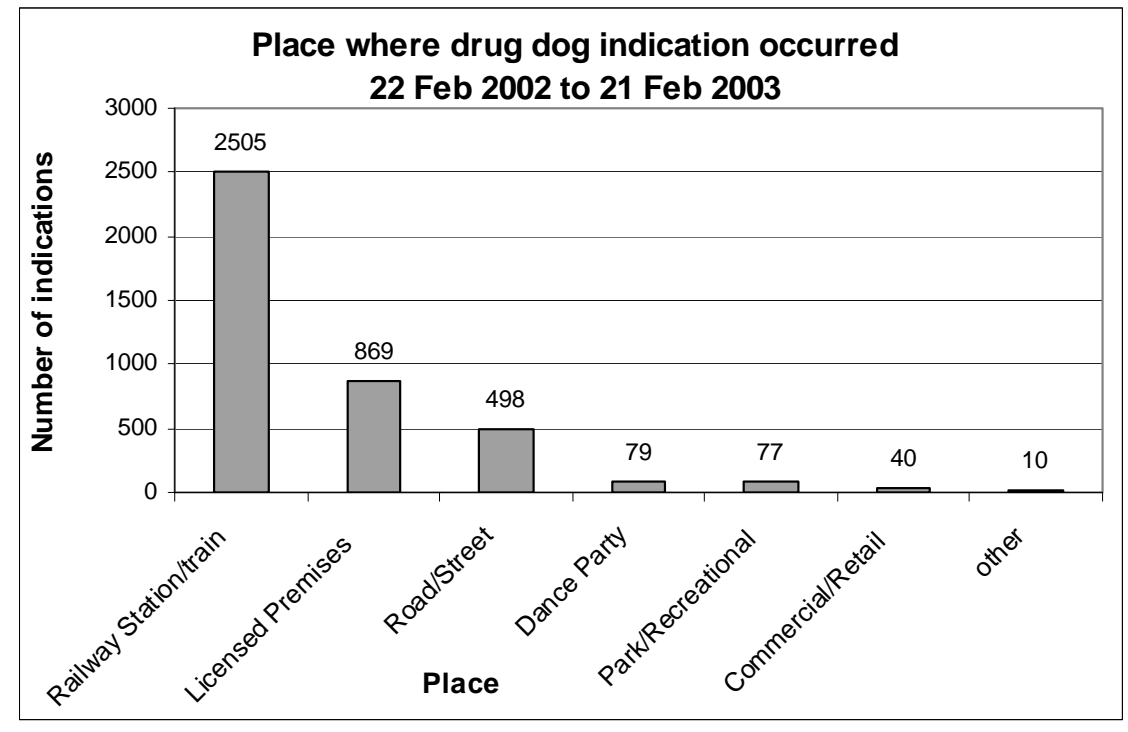
Suburb	Number of drug dog indications	Suburb	Number of drug dog indications
Hornsby	710	Ashfield	87
Kings Cross	383	Newtown	83
Blacktown	345	Burwood	81
Granville	239	Coffs Harbour	77
Wollongong	238	Glenfield	72
Surry Hills	197	Parramatta	72
Strathfield	98	Liverpool	71

Figure 2 below shows the type of location at which the drug dogs made indications.

Figure 2

Source: NSW Police Dog Unit Master Spreadsheet, 22 Feb 2002 to 21 Feb 2003

*other includes vehicle, carpark, judicial/police premises, bus stop, wharf.



The type of location can potentially impact on issues such as the privacy of people being searched. Our observational research has noted that almost all searches occur at or close to where the person was stopped. It is unusual for a person to be conveyed to a police station for a personal search.

Drugs found following indications by drug detection dogs

Following an indication by a drug detection dog, police search the person indicated. Sometimes a building, item of property or vehicle is searched. We analysed police records of the results of these searches to see how often police were locating drugs when using the drug detection dogs. Police located drugs in 1110 (27%) of the 4078

searches conducted after drug dog indications. No drugs were found in the remaining 2968 searches, but many of those searched admitted to having had some contact with cannabis or being at a place where cannabis had been smoked. In a total of 71% (2940 of 4078) of incidents either a drug was found or some kind of admission in relation to drugs (usually cannabis) was made.

Figure 3

Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003

Note: The category 'Drugs found' includes any search in which one of the things found by police was a drug (recorded as amphetamines, ecstasy, cocaine, cannabis and other drugs) or an implement for using drugs. The 'No drugs found' category refers to all searches where no drugs were found. This includes instances where the person searched admitted to having had contact with drugs (see Figure 5, below) and may include searches where other items were identified. Possession of some of these items may have constituted an offence.

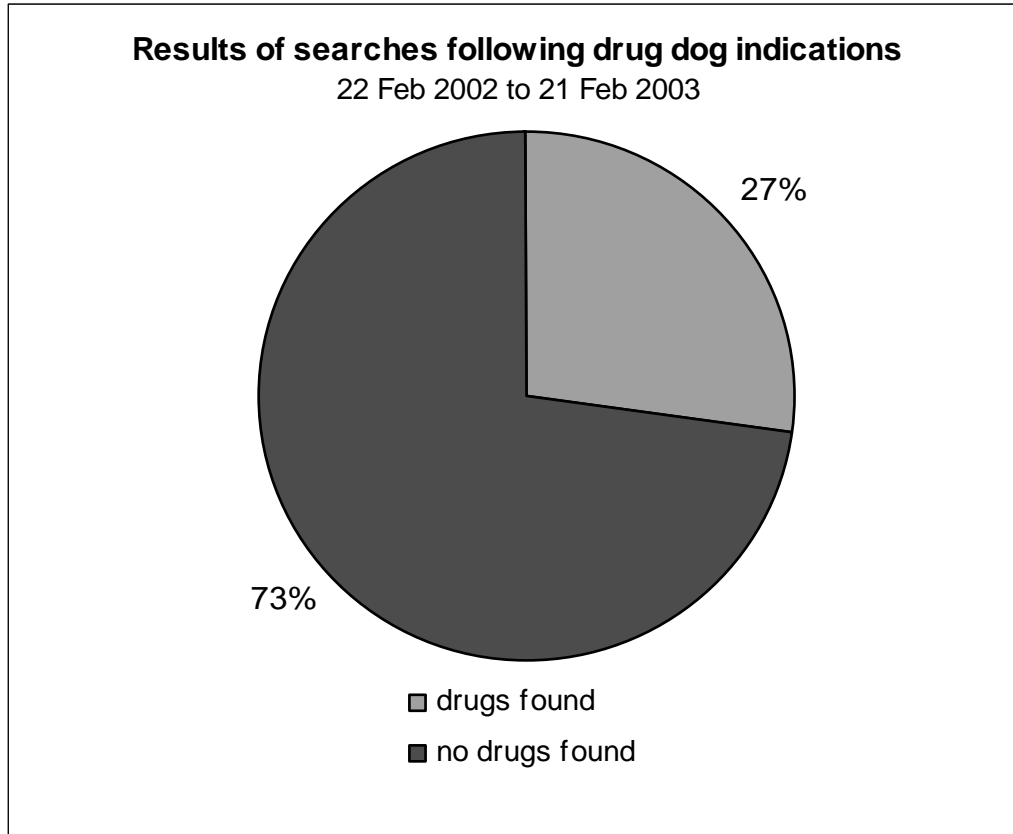
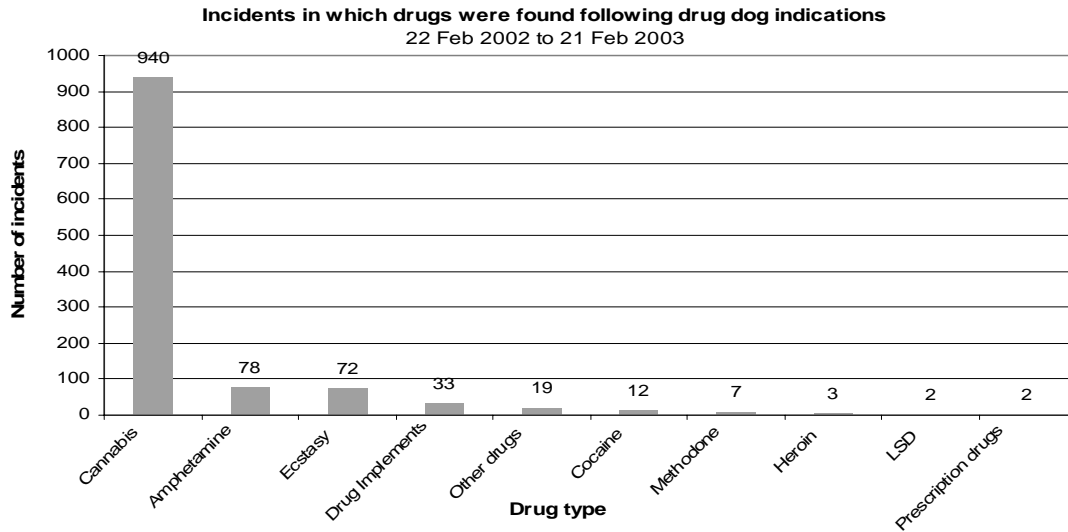


Figure 4, below, shows the types of drugs found.

Figure 4

Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003

Note: Because in some incidents more than one drug was found, the number of results adds up to more than the total number of incidents.



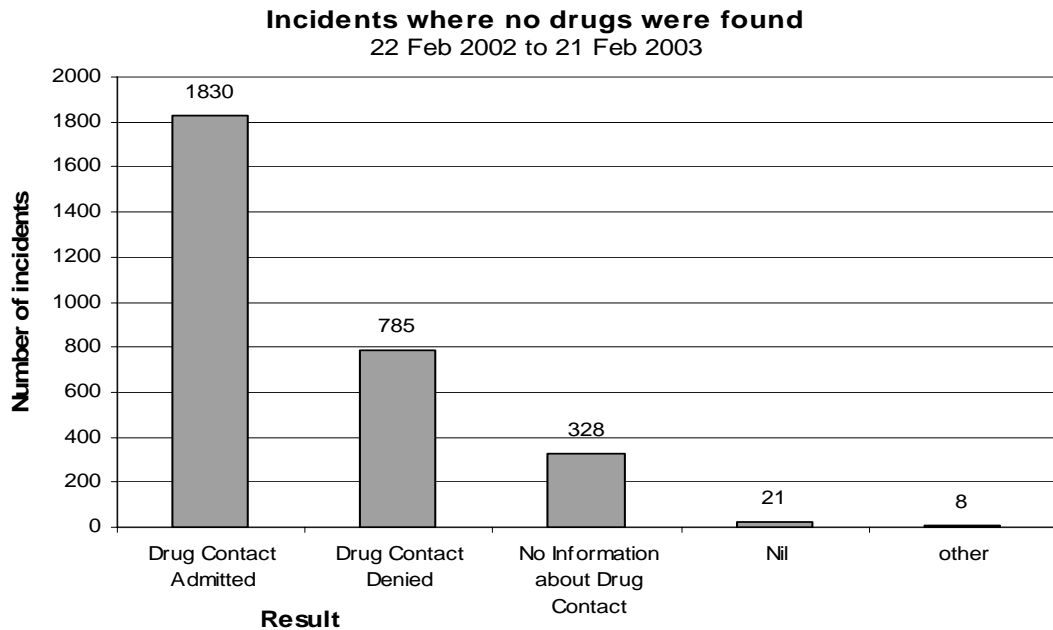
Cannabis was the most commonly located drug. In part, this might be because the strong scent of cannabis is easier for the drug detection dogs to detect. Another factor might be that cannabis is more commonly used than other illicit drugs.

Figure 5 below, depicts the information recorded about searches in which no drugs were found.

Figure 5

Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003

Note: On one occasion police recorded that a person admitted drug contact but also that a drug had been found on the person. This incident has not been included in figure 5.



On approximately 61% of occasions on which police found no drugs, the person searched made some kind of admission that s/he had personally smoked cannabis or had been around people smoking cannabis.

Drug Weights

The table below sets out the total weight of each type of drug found by police using a drug detection dog in the first 12 months of the operation of the Act.

Table 3

Source: NSW Police Dog Unit Master Spreadsheet, February 2002 to February 2003.

Note: For some records no weight was recorded and in other records, rather than a weight in grams, police expressed the quantity of drugs in terms of the number of tablets found. Average and median figures have been calculated according to the number of incidents in which a drug with a weight recorded in grams was found.

TOTAL WEIGHTS OF DRUGS FOUND - 22 Feb 2002 to 21 Feb 2003					
	No. of incidents in which drug found*	grams	tablets	median	average
Cannabis	923*	4267.2		1.6	4.62
Amphetamine	77*	98.4		0.86	1.90
Ecstasy	65*	73.7	12	0.7	1.14
Cocaine	12	12.8		0.89	1.07
Heroin	3	1.7			
LSD	2	3.7	1 tab		
Ice	1	0.4			
Morphine	1		10		
Rohypnol	1		1		
Serepax	1	0.5			
White powder	6	5.93			
tablets/pills	7		8		
liquid	1	6.2			

* not including incidents where no weight was recorded or weight was not recorded in grams

Cannabis

Cannabis was the most common substance found, and accounted for the bulk of drugs located. The table shows that a total of 4267.2 grams of cannabis was found. On 20 occasions police found 30 grams or more of cannabis, including seven occasions when 40 to 62 grams of cannabis was found, and five occasions when 93 to 240 grams was found. On most occasions, however, police found relatively small amounts of drugs. In 50% of occasions in which police found cannabis, the cannabis located weighed less than 1.6 grams.

Amphetamine

Amphetamine was the next more commonly located drug and also represented the second largest drug haul in grams, with a total of 98.4 grams of amphetamine being found. On 33 occasions police found one or more grams of amphetamine, including eight finds of 3 to 8 grams of amphetamine. On one occasion police located 41 grams of amphetamine.

Ecstasy

Police located a total of 73.7 grams of ecstasy over 65 incidents. On all but one of these occasions police located more than 0.25 grams of ecstasy. In about half the incidents (32 of the 65 searches) police found more than 0.75 grams of ecstasy. The biggest finds were two searches in which police located between 5 and 8 grams of ecstasy. Police also located a total of 12 ecstasy tablets (weight not recorded).

Cocaine

Police found a total of 12.8 grams of cocaine, ranging from 0.36 grams (the smallest amount found in one search) to 2.6 grams (the largest amount in one search).

Multiple drug finds

On 51 occasions more than one drug was found. On 43 of these occasions a combination of cannabis and either cocaine, ecstasy or amphetamines was found. On two occasions a combination of cannabis, ecstasy and amphetamine was found.

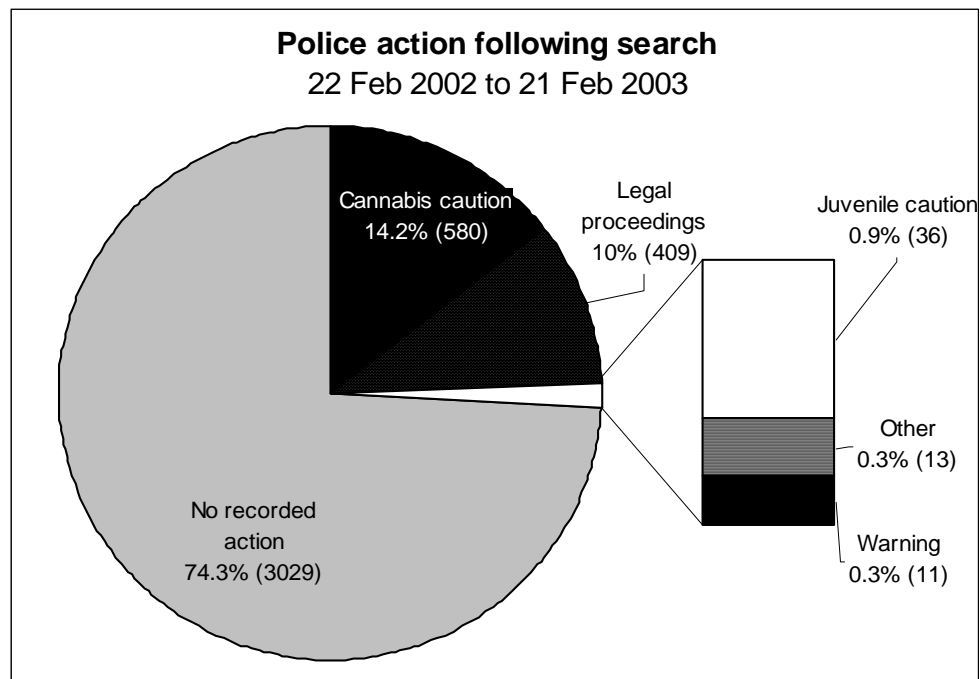
Action taken by police following drug dog indications and searches

Police have a number of options when considering taking action in relation to a person believed to have committed an offence. These options range from an informal warning to a formal charge.³³

Figure 6

Source: NSW Police Dog Unit Master Spreadsheet, February 2002 to February 2003.

Note: These actions are in relation only to the first person of interest registered for any search incident listed on the database. This excludes action taken in relation to four searches in which a second person of interest was mentioned. The category of 'other' includes some recording errors, and records marked 'further investigation', 'traffic infringement notice', and 'wanted'.



³³ Part way through the review period the Local Courts Reform package commenced. A part of this package of reforms was the replacement of 'charges' with other actions such as Court Attendance Notice (CANs).

Figure 6 (above) shows that police recorded no action in relation to close to three-quarters of search incidents. This corresponds with related data showing that about 73% of searches led to no prohibited drugs being found on the person.

When police did take formal action they were most likely to issue a cannabis caution. Cannabis cautions were issued in 55% of occasions on which police took formal action in relation to a person (580 of 1049 incidents).

In 10% (409 of 4078) of incidents police took action to initiate legal proceedings against the person. In close to 60% (238 of 409) of these incidents police issued a 'Field Court Attendance Notice' to the person.

Other repercussions

In addition to criminal penalties arising from drugs being found on a person, sometimes there are other repercussions which fall outside the formal criminal justice system. For example, police records noted one instance where the drug detection dog was deployed in a leagues club. A hospitality worker employed at the club was searched following a drug dog indication. The police record of that search noted:

The POI [person of interest] was then spoken to by police and appeared nervous at the time. The POI produced a packet of cigarettes from his front trouser pocket and handed them to police as he complied with a request to empty his pockets.

Inside the cigarette pack, a small plastic bag containing 1.9 grams of cannabis was located.

When questioned, the POI initially indicated that he had found the cigarettes. He was then cautioned and the cannabis caution scheme was explained to him and other options that were available to police to deal with drug matters.

The defendant then admitted that he had purchased the cannabis for \$20.00 for his own use and agreed that he would accept a cannabis caution if he was eligible.

...

As the POI was an employee of the [name of leagues club], management was informed. The POI was then relieved of his duties and terminated his employment with the club.³⁴

We confirmed with the police involved in this event that the person of interest lost his job and that management were informed that the employee was found in possession of cannabis. Police added that the duty manager from the leagues club was nearby during the search and could see the results for himself.³⁵

Concerns have also been expressed to our office about the consequences of police records of offences of drug possession. The person quoted below was found with 1.96 grams of cannabis and a pipe while drinking at a nightclub.

I was disappointed, because I felt that they had a fair amount of discretion and they didn't need to do what they did. They did not need to take me to the police station and strip search me and give me a permanent police record, which is what a cannabis

³⁴ Event record 2.

³⁵ Telephone conversation with involved police officer, 1/9/03. Privacy and civil liberties issues are discussed in more detail in Chapter 6 'Protection of Privacy and Civil Liberties'.

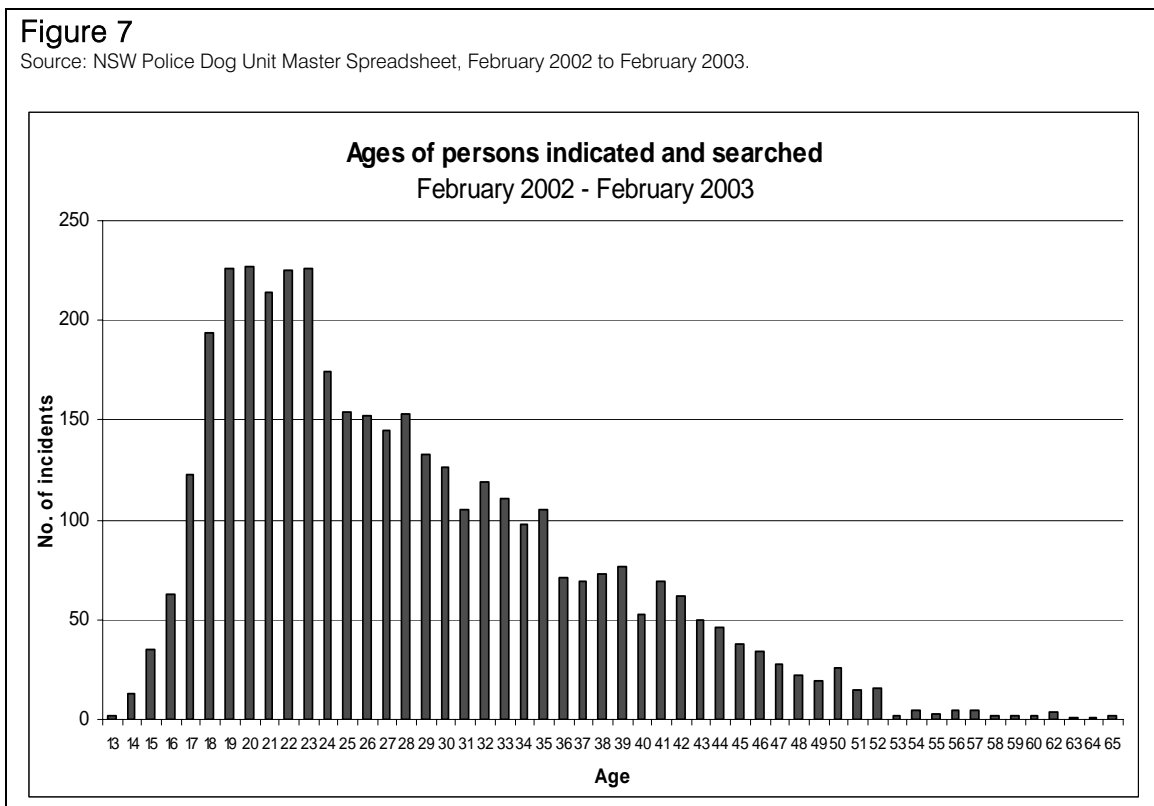
caution notice is. I've since phoned their helpline and they've looked up my record and they said 'yes, these notices are on my record'. I asked how many years of good behaviour I required before these things are deleted and they said that they are never deleted. And my fear is that if I have any future dealings with the police, this is going to prejudice their treatment of me, and I am fearful of having anything to do with the police, I keep away from them, even though I regard myself as a law-abiding citizen...

My concern about getting these notices is that in the past I've worked in jobs where they require you to have a security clearance, a police check. I can't really get any straight answers about who gets access to what and what exactly the ramifications of this will be, of having this on my record. They say you haven't been charged, but would it stop you from getting a government job, where you have to get a police check. And if it did affect your employment, is that justified as that being the intention of the legislation – for users of soft drugs to be discriminated against?³⁶

Characteristics of people indicated by drug detection dogs

The age of the person searched³⁷ was recorded in 3928 (96%) incidents. The average age of persons searched by police was 28 years. The median age was 26 years.

Figure 7 below depicts the ages of persons searched.



Although the Dog Unit's summary data notes the ages of persons searched, it does not include information about the gender, ethnic origin or Aboriginality of the person. Some of this information is available in the police COPS records which are made in

³⁶ Focus group of members of the public, June 2002. This person was searched prior to the commencement of the Drug Dogs Act but came forward after learning of the Ombudsman's review role. The issue of recording information about searches is discussed in more detail in Chapter 6 'Protection of Privacy and Civil Liberties'.

³⁷ In four incidents age details were recorded for more than one person of interest. This information is based on the age recorded for the first person of interest only.

relation to many of the search incidents. We will conduct an examination of these records for our final report for the review of this legislation.

Our observations of the use of drug detection dogs suggest that the majority of persons searched are male.

Chapter 5. Accuracy of drug detection dogs

Accuracy is a key factor in the efficacy of using drug detection dogs to sniff out drugs.

Training Drug Detection Dogs

We observed a training session for the drug detection dogs.³⁸ We were advised that the dogs are trained every week and 'accredited' (or tested for their accuracy) every three months.

The drug detection dogs are only ever fed when they make a drug indication. In a sense, every feed is a training session because it reinforces the dog's connection of the scent of drugs with a food reward. If the dogs are not working on a particular day the handler will use a supply of 'drug scents' to allow the dog to indicate and be fed. These feeds are known as 'maintenance feeds'. The dogs are also praised and patted by their handlers when they indicate correctly. This also forms part of their reward or incentive to find drugs.

The drug detection dogs are also trained with 'distracters'. These are items such as food that the dogs might commonly come across on the street. The dogs learn that if they indicate these items they will not be fed. If handlers notice that a dog seems to be indicating 'falsely' during an operation they will try to work out what substance is causing the 'false positive' and train the dogs not to indicate when it detects the odour of that thing. We were informed that at one time the dogs were becoming confused by the odour of vanilla. Consequently, vanilla was used as a distracter in training until the dogs learned that they would not be rewarded for indicating that scent. Although the dogs often try to eat food from the ground, we have observed that handlers will always pull the dogs away and sometimes remove the food from the dog's mouth (although sometimes the dog is just too fast).

Results in the field

As noted above, during the first 12 months of the operation of the Drug Dogs Act, almost three-quarters of drug dog indications did not lead to police locating drugs on a person. However, analysis of police records shows that in 61%³⁹ of all incidents in which no drugs were found, the person searched made some kind of admission that they had recently used cannabis or that they had been in the presence of cannabis smokers. Our observational research confirms that people regularly make this kind of admission to police.

When a drug detection dog indicates a person because it can smell the scent of a drug the person recently came into contact with, but is no longer in possession of, police call this a 'residual' indication. One handler told police at a briefing we attended:

*The dog doesn't know the difference between a cannabis scent that is hours old and one that's there.*⁴⁰

³⁸ At Menai Dog Unit, 16 July 2002.

³⁹ Derived from NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003.

⁴⁰ Ombudsman observer notes, August 2003.

According to NSW Police, the 'strength of any residual odour will be dependent on numerous factors including duration and/or frequency of secretion [of the drug] in the indicated location.'⁴¹

Our observer noted one conversation with a handler as follows,

*Handler says that the dogs are given mixed messages. When working, he does not feed the dog if it seems to only be picking up residual amounts because this would reinforce the behaviour. However, when the dogs are trained and fed at home this is done with residual amounts.*⁴²

However, admissions do not accompany all 'negative' searches. In 39% of 'negative' search incidents the drug detection dogs indicate the presence of drugs, but nothing is found and no admission is made.⁴³ There are a number of possible explanations for this finding. For example, according to one handler:

*If the dog reacts to someone and they say they have nothing to do with drugs they are lying – that's my personal opinion.*⁴⁴

It may also be possible that the person came into contact with cannabis smoke without being aware of it, for example at a pub or party. The NSW Dog Unit has stated that there is no 'scientific evidence' to suggest that the dogs would indicate a person who has been in the presence of other people smoking cannabis, but who has not been in possession of the substance themselves. However, our observations and police records of searches note that this is a common explanation provided by persons searched by police, and who are not found to be carrying any drugs.

As the comments below suggest, handlers also believe that in some instances people may be getting away with drugs in their possession because police are not thoroughly searching the person.

*I could guarantee that a lot of people are walking away with gear on them because they're not searching them right. You can't ask police to strip search everybody. I wouldn't want to go that far but I've had that many people stuffin' it down their underpants. How many other people are walking away with stuff?*⁴⁵

*It's true. Like I've had my dog chase someone 100 meters up the street and once again it's experience too. 'Cause they were searching the guy and he was carrying a bread roll and I said 'Make sure you check his bread roll' and nup. And they came back and said, 'No, he hasn't got anything' and I went back to him, pulled the roll out and he had, like, 10 grams sitting inside the roll. And look, we don't do that with everyone.*⁴⁶

The fact that police should take into account privacy concerns when conducting searches in public places may also mean that searches are less thorough than they might otherwise be. Some drugs may be secreted in areas unlikely to be found by police conducting 'pat down' searches. It has also been suggested that some people carrying drugs may be alerted to the presence of the drug detection dog (because

⁴¹ NSW Police Comment on NSW Ombudsman Draft Discussion Paper, 8 June 2004, p. 3.

⁴² Ombudsman observer notes, March 2003. The Dog Unit would prefer that all training be conducted using illicit drugs however currently industrial issues related to kennelling have not allowed this to consistently occur.

⁴³ Derived from NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003.

⁴⁴ Ombudsman observer notes, August 2003.

⁴⁵ Focus group of drug detection dog handlers, May 2003.

⁴⁶ Focus group of drug detection dog handlers, May 2003.

most operations involve 'high visibility' policing) before police approach them. They may dispose of the drugs moments before the drug dog makes its indication.

However, it is also possible that the drug detection dog has simply 'got it wrong'.

We were informed of one incident in which a woman aged in her 50s was 'required to empty her purse in front of others after a dog had signalled that she was carrying drugs'.⁴⁷ The woman had a chicken schnitzel in her bag. This woman wrote to her local MP, stating that she felt "shocked and humiliated".⁴⁸

Drug detection dog handlers stridently defend the accuracy of their dogs. When asked whether the dogs might indicate a person because the person was carrying food, or because the person owned cats or dogs, the handlers' responses included:

My dog never lies. It never lies!⁴⁹

I think each dog is different, because I know my dog. It might sniff someone that smells different, about a dog or a cat or something, but they don't indicate to me that's drugs.⁵⁰

We're not going to turn around and say, 'oh, the dogs sniffed them, OK, well we'll stop them'. The dog's just sniffing, and as the trained handlers, we know that. Perhaps the other police we work with don't know, but we'll just go, 'nup that's wrong'. So it's a load of crap. The dogs don't indicate on food or cats or dogs. They might sniff them. They might pay them a little more attention, but that person's not being stopped or searched or anything else just because they've been sniffed.⁵¹

If they're going to pick up on food, every food store we walked past the dog would be going off its head. And most of the time where we're working there's a takeaway 10 metres away.⁵²

During our observational research we have noted some instances in which the ability of the drug detection dog to detect a prohibited substance has seemed quite remarkable. The notes of one of our observers from an operation in Inner Sydney state:

From the top of the stairs (20-30 meters away) the dog detects an odour from a man who is leaving the bar. The man runs away and police and the dog chase him. The man ends up in a dead-end area and is questioned and searched by police.⁵³

The man was searched by police and was found to have both cannabis and cocaine in his possession.⁵⁴

False positives

During the Parliamentary debate about the Bill, one member of Parliament⁵⁵ commented on the possibility of 'false positives', or indications by the drug detection dogs that were not triggered by the presence of the scent of a prohibited drug. The

⁴⁷ Correspondence from Clover Moore, MP, 4 December 2002.

⁴⁸ Quote from the woman's letter, in correspondence from Clover Moore, MP, 4 December 2002.

⁴⁹ Focus group of drug detection dog handlers, May 2003.

⁵⁰ Focus group of drug detection dog handlers, May 2003.

⁵¹ Focus group of drug detection dog handlers, May 2003.

⁵² Focus group of drug detection dog handlers, May 2003.

⁵³ Ombudsman observer notes, June 2002.

⁵⁴ Ombudsman observer notes, June 2002.

⁵⁵ The Hon. Peter Breen, MLC Legislative Council Hansard, 13 December, 2001, p 20231.

member was concerned that a man had been found to be carrying prescription drugs during a police 'raid' at cafes in Nimbin. He commented:

*These drugs apparently caused what is known as a 'false positive' identification by the dogs. I understand that this is a common problem.*⁵⁶

Infrequently, we have observed the drug dogs to make such 'false positives'. On one occasion in a Northern Sydney suburb, the drug detection dog indicated a woman who appeared to be aged in her 40s. The handler cautioned the woman and explained that the dog had made an indication. At first the woman denied having any drugs on her. She then appeared to recall that she was carrying her son's ADD (Attention Deficit Disorder) medication. This medication apparently contains a form of amphetamine. The handler explained to the woman that the dog had probably picked up on this amphetamine. The woman had a female companion with her who commented during the interaction, "Quite unreliable isn't it?" The police officer answered, "Not really, as some people sell it illegally."⁵⁷

Another senior police officer told us of one experience he had with a drug detection dog. The officer explained that on one occasion the dog indicated a man as he alighted from a train. The man denied that he had any involvement with drugs and this police officer was inclined to believe him. When the man was searched he had some prescription drugs on him that he needed to treat a medical condition.⁵⁸

Use of drug dogs in crowded environments

A further issue in relation to the accuracy of drug detection dogs is their ability to locate the exact source of a scent in crowded, enclosed environments. We were advised of one instance in which a police prosecutor withdrew a charge of 'resist officer in execution of duty' from prosecution because of his view that the drug detection dog indication, in this instance, was not sufficient to create a reasonable suspicion to search the person.⁵⁹ This incident was also one in which our observers were in attendance. The indication occurred in a pub that was described by one observer as "crowded and loud". The indication in question appeared to be one of five which occurred in rapid succession over a short period (less than five minutes).⁶⁰

In an email from this prosecutor, he informed us of his view that: "Clearly the dogs are a great asset, but not in INDOOR AND/OR CONFINED ENVIRONMENTS."⁶¹ He explained that in this instance two people were standing together at the time of the drug detection dog indication. The prosecutor formed the view that a magistrate would not accept that the dog could tell which person was the source of the scent. According to the prosecutor, there may have been reasonable suspicion in relation to the presence of a drug somewhere in the area but not in relation to that man in particular. The prosecutor was further concerned that police did not find any drugs on

⁵⁶ The Hon. Peter Breen, MLC, Legislative Council Hansard, 13 December, 2001, p. 20231.

⁵⁷ Ombudsman observer notes, December 2002.

⁵⁸ Ombudsman observer notes, December 2003.

⁵⁹ If a search is judged to be illegally conducted then any action for resisting a police officer trying to perform the search would also be likely to be unsuccessful in court.

⁶⁰ Consequently, as our observer was moving rapidly through the pub with the handler, her notes on this particular incident are not sufficiently detailed to be useful in this context.

⁶¹ Email from police prosecutor, 5 November 2003. Original emphasis.

the man and that this would not assist in establishing that the police officer had the required reasonable suspicion to search the man.

We spoke to the handler about the incident some months later. Although the handler could not recall all the details of the particular indication, we were advised of the handler's general approach to working with the dog:

*I won't stop anyone if I'm not 100% sure. No matter how crowded it is, I won't stop them unless I'm sure it's that person.*⁶²

We have noted that sometimes a handler will ask people to move out of a group or to separate a little so that the handler can determine which person the dog is interested in. The following notes from one of our observers at an operation at a dance party illustrates this point:

*Dog approaches a group of young people. The dog is very attracted to the group and moves in and out between them. The dog finally settles on a girl who says she is 16 years old ... Prior to this indication the handler asks one young man to move slightly away from the group to let the dog have a proper sniff of him. This appears to be to clarify if the dog is interested in the man. The dog is not interested and the man goes back into the group.*⁶³

Questions for consideration

- 5(a) In what circumstances might an indication by a drug detection dog be sufficient or insufficient to raise a reasonable suspicion that a person is carrying prohibited substances?
- 5(b) Police have located drugs in approximately 27% of searches conducted as a result of drug dog indications. In the context of this rate of finding drugs, is it reasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog? Why/why not?
- 5(c) Does the significant proportion of search incidents in which there is evidence of a 'residual' scent (usually of cannabis) impact upon police practice in forming a reasonable suspicion to search a person.
- 5(d) In what way is the environment (for example, crowded environments) relevant to the question of reasonable suspicion? Should police be able to give directions to persons for the purpose of screening groups with a drug detection dog?
- 5(e) Does the practice of searching persons who have had some prior contact with cannabis, either through their own use or being in the vicinity of other's use, reflect fair and effective drug law enforcement?

⁶² Telephone conversation with drug dog handler, 20 November 2003.

⁶³ Ombudsman observer notes, March 2003.

Chapter 6. Protection of privacy and other civil liberties

Behaviour of the Drug Detection Dog

Section 9 (1) and (2) of the Drug Dogs Act provide that:

A police officer carrying out general drug detection under this Part is to take all reasonable precautions to prevent the dog touching a person.

A police officer is required to keep a dog under control when the officer is using the dog to carry out general drug detection under this Part.⁶⁴

In introducing the Drug Dogs Act the (then) Police Minister stated:

... if despite the best efforts of the police officer handling the dog, an inadvertent or incidental touching takes place then the touching by the dog does not constitute an unlawful search by the police officer.⁶⁵

During our observations of the use of drug detection dogs, we have noted that the actual sniffing or screening by the dogs was generally unobtrusive. When the dog appeared to detect the scent of an illegal substance on a person, the sniffing usually did not appear to involve contact between the dog and the member of the public. Occasionally a dog would be observed to touch a person with its nose. Sometimes a dog would be observed to 'excitedly' sniff amongst a group of people, nudging the legs or belongings of people in an apparent attempt to determine the more precise location of the scent. When the dog was in a very crowded area the dog would often brush past people and occasionally nudge them. Sometimes people were surprised by the presence of the dog but very few appeared to be seriously in fear of the dog.⁶⁶ Very rarely did we observe a dog attempt to rise up on its back legs towards a person and the handler always pulled the dog back if this occurred. Occasionally, a dog was seen to walk on or stand on bags or other belongings.⁶⁷

Privacy of searches and feelings of embarrassment

A range of views were expressed in NSW Parliament about the degree of embarrassment that might be associated with an approach by a drug detection dog and whether such embarrassment was an acceptable consequence of enforcing the state's drug laws.⁶⁸

Several community-based organisations⁶⁹ have opposed the use of the drug detection dogs claiming that the use of the dogs infringes civil liberties and the privacy of persons sniffed and searched. An internet site⁷⁰ established to provide information

⁶⁴ *Police Powers (Drug Detection Dogs) Act 2001* s 9(1) and (2).

⁶⁵ The Hon. Michael Costa, Legislative Council Hansard, Second reading speech, 6 December, 2001, p. 19875.

⁶⁶ It seems that members of some ethnic communities appear to be more fearful of the presence of dogs than other communities. This will be discussed further below.

⁶⁷ A number of complaints received by this office have alleged that drug detection dogs have made more intrusive contact. We will discuss these matters in detail in our final report.

⁶⁸ See for example, the Hon. Helen Sham-Ho, Legislative Council Hansard, 13 December 2001, p. 20203; Ms Clover Moore, MP, Legislative Assembly Hansard, 6 December 2001, p. 19875.

⁶⁹ Including Redfern Legal Centre, ACON and the NSW Council for Civil Liberties.

⁷⁰ http://www.snifferdogs_info/noticeboard.htm

about the use of drug detection dogs and to allow persons to voice their opinions on the dogs contains numerous cases where individuals sniffed and searched complain of embarrassment and humiliation:

It [the search] was a very humiliating experience, having taken place close to bars and in full view of a multitude of people walking past. More than a month since, I still feel deeply affected by what occurred.⁷¹

Having lived in Kings Cross for 3 years and having been subjected to approaches by sniffer dogs on two occasions, I can tell you that unless you have experienced it, you will have no idea of the sensations it gives rise to. I am a law-abiding citizen and I DEEPLY resent the accusation that being sniffed implies.⁷²

We are also aware of two instances in which hospitality employees lost their jobs as a result of their employers finding out about the results of searches following indications by a drug detection dog.⁷³

Our own observations of the initial contact by a drug detection dog with a person found very little actual contact between dog and person. It appears that the singling out of the person by the dog and the often very public nature of the subsequent search of the person by police is more likely to account for the embarrassment reported by some people.

It's a bit embarrassing with 50 people standing around watching.⁷⁴

I am concerned about the procedure that police followed after the dog picks a person out. I don't think I should have been searched out on the street like that.⁷⁵

I felt shocked and humiliated at being forced to empty my personal belongings onto a table in a public bar in front of everybody.⁷⁶

At pre-operation briefings we observed, operation commanders routinely advised police officers to seek private spaces to conduct searches. In practice, however, truly private search areas in public places are rarely available. Police often remove a person from the place at which the indication occurred to an area where fewer people are present. Sometimes police utilise a room allocated for their use, such as during operations at railway stations. However, more often than not the searches we observed were conducted in public view. In a response to one complaint on this issue police noted:

If the search is to take place at the location [of the drug dog indication] care is taken to minimise embarrassment to the person of interest and the most suitable area with regard to privacy is used for that search. It is not always practical however, to have a completely private area available for these searches.⁷⁷

In relation to the same complaint, the Local Area Commander of the police who undertook the search wrote to the complainant:

⁷¹ http://www.snifferdogs_info/noticeboard.htm

⁷² http://www.snifferdogs_info/noticeboard.htm

⁷³ See for example our discussion in Chapter 4 'Summary Information'.

⁷⁴ Statement from searched person made during police operation, Ombudsman observer notes, August, 2003.

⁷⁵ Statement to police by complainant, May 2002.

⁷⁶ Statement of constituent referred to in letter from Clover Moore MP to the NSW Ombudsman, 4 December 2002.

⁷⁷ Correspondence from NSW Police Inspector, November, 2002.

...I do agree with you that the searches conducted by Police during such operations need to be undertaken in private. In this regard I will write to the [name of railway station] Manager and request that when a police operation is being undertaken a private room, for the exclusive use of police, be allocated for the purpose of conducting searches.⁷⁸

Questions for consideration

- 6(a) If you have been screened by a drug detection dog or searched by police after a drug dog indication, we are keen to hear about your experience. How did the police relate to you? Where were you searched? How did you feel about the experience? How did the drug detection dog behave?
- 6(b) What actions can be taken by police to minimise any feelings of embarrassment, humiliation and the like, that may be experienced as a result of being searched in public?

International Covenant on Civil and Political Rights

Concerns were expressed in Parliament, in correspondence from the Member for Bligh,⁷⁹ and by the Deputy Chief Magistrate in *Police v Darby*,⁸⁰ that use of drug detection dogs to search people in public places may constitute a breach of personal rights. The personal rights referred to are those in Article 17 of the International Convention on Civil and Political Rights, which provides:

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

As stated earlier, *Police v Darby*⁸¹ was overturned on appeal. Justice O'Keefe, who presided over the appeal case, determined that since the magistrate's decision in relation to the illegality of the 'search' by the drug detection dog was erroneous, the question of the breach of personal rights was not one which needed to be considered on appeal. We have been advised that the matter will again be considered on appeal to the New South Wales Court of Appeal.⁸² We do not yet know the grounds for the appeal.

Records of the searching of persons following drug dog indications

Apart from being embarrassed and humiliated as this event occurred at 4.00pm when there were hundreds of commuters in the area, it has left me a number of concerns and questions. 1. What happens to my details, are they kept on record, or are they destroyed...⁸³

⁷⁸ Correspondence from Local Area Commander to complainant, October, 2002.

⁷⁹ Letter to the Ombudsman from Clover Moore MP, Member for Bligh, dated 4 December 2002.

⁸⁰ *Police v Darby* (unreported), Downing Centre Local Court, 21 November, 2001.

⁸¹ *Police v Darby* (unreported), Downing Centre Local Court, 21 November, 2001.

⁸² *Glen Paul Darby v Director of Public Prosecutions*, File no: 041237/02, lodged 23/12/2002.

⁸³ Complaint received by NSW Ombudsman, 2002.

During the first six months of reviewing the implementation of the Drug Dogs Act, we were alerted to an apparent police practice of recording 'Information Reports' and other electronic records of persons searched following an indication by a drug detection dog, when no drugs were found as a result of the search.

Concerns have also been expressed to us about the consequences of the record made by police in conjunction with a cannabis caution. For example, the concern that such a record might influence a person's ability to obtain some types of employment and concern that such a record will never be expunged.⁸⁴ NSW Police has informed us that 'routine criminal history checks for employment purposes do not include cannabis cautions as they are not convictions.' Police have also informed us that records of 'unsuccessful' searches (where no offences are detected) would not be included in 'routine' employment checks.⁸⁵

From our observation of police operations using drug detection dogs, it appears that it is very common practice for police to ask people, often before a search has been conducted, to provide identification and/or to state their name and date of birth. Our observations and police data also suggest that people usually comply with this request.

Dog Unit records show that in the first 12 months of the operation of the Drug Dog Act, 98% (3996 of 4077)⁸⁶ of persons searched as a result of a drug dog indication gave their name to police.⁸⁷

Although there appears to be no statutory power for police in these situations to obtain names and addresses of persons who have not committed any offence, police may request that the person provide this information. When a person complies with such a request it is often described as 'policing by consent'.

The police we observed during operations did not generally offer information to the person searched about how their personal details would be used. Nor did police usually inform the person that they did not have to provide their details. However, police are under no obligation to do so.

In some local area commands, we noted that records with a person's identification details appeared to be made on the police COPS system as a matter of course, whether or not any admission of drug use or other offences was made. For example, information provided to police at one pre-operation briefing stated:

*Intelligence Reports to be submitted for each person stopped and searched, regardless of result.*⁸⁸

We were concerned that members of the public, who had committed no offence and made no admissions, and about whom police had no prior intelligence information, were having their details recorded on COPS solely because of an indication by a drug detection dog. We were concerned that this record had the potential to prejudice future police dealings with this person.

⁸⁴ See for example our discussion in Chapter 4 'Summary Information'.

⁸⁵ NSW Police Comment on NSW Ombudsman Draft Discussion Paper, 8 June 2004, p. 8.

⁸⁶ We removed one record because of a recording error, making the total number of incidents 4077.

⁸⁷ Calculated from Dog Unit Results Spreadsheet, February 2002 to February 2003.

⁸⁸ Operation Orders, June 2002.

A police officer from an inner city command which utilised the drug detection dogs regularly, also called us expressing concern about what he perceived to be an unfair requirement to record information about searches from which no drugs or other relevant intelligence resulted.

We approached NSW Police about this matter and requested that NSW Police formulate a clear policy on the issue of recording. As a result an information sheet was developed to guide police on this issue. The information sheet states:

All officers involved in Operations using drug dogs will face occasions where the dogs indicate the presence of a prohibited drug or plant on an individual, but no prohibited material is found during a subsequent search of that individual.

Under no circumstances are officers required to file an Information Report (IR) for all such positive indications by the dogs; a 'blanket rule' to submit an IR of all these instances is not appropriate...

In relation to Operations using the drug dogs, officers should be reminded that a positive indication from the dog does not in itself provide sufficient justification for the filing of an IR. In the case of a nil find, officers should carefully examine all other available information before deciding to submit an IR.⁸⁹

According to this information sheet, all drug dog indications are to be recorded in a police officer's notebook and on the spreadsheet on search outcomes kept by the Dog Unit.

Since this information sheet was developed, we have noted that some commands have continued to use the COPS system to record the details of persons searched where no offence was committed and no admission made. These instances have been followed up with NSW Police. We will continue to monitor police practice for the remainder of the review.

Since this policy was introduced, several police officers⁹⁰ have approached us with their concerns about why police should record details of all persons searched, including:

- If the person makes a complaint in relation to the search and there is a record on COPS with the person's name, police can easily track down the incident and provide an explanation to the person. If necessary police can also easily establish the identity of officer(s) involved in the search;
- A concern that useful intelligence information might be lost;
- A general concern that any incident in which police invade a person's privacy should result in a record being kept documenting the incident and the reasons for it; and
- A concern that police statistics will not properly reflect the work performed by police if these searches are not recorded.

⁸⁹ New South Police, *Filing Information Reports following Drug Dog Detections*, undated.

⁹⁰ Telephone conversation with Local Area Commander, 4 November 2003. Telephone conversation with police officer, October 2003. Telephone conversation with police officer, July 2003.

In correspondence to this office, one Local Area Commander, after first stating that he would abide by the corporate guidelines, commented:

By way of a personal view, all people searched who are not otherwise prosecuted, ought to be recorded on COPS. I think the reasons are obvious. Too often this organisation has been criticised for suboptimal record keeping arrangements. By recording these interactions, there is a transparent record of all such incidents.

In my opinion, the current arrangements as espoused in the document titled 'Filing Information Reports following Drug Dog Detections' is also problematic particularly as it concerns Note Book entries and Result Form records. In my view, th[at] information should be recorded so it can be read[ily] retrieved, transparent and linked to individual's names. For example, an individual might be the subject of several indications in different places at different times though subsequent searches were fruitless. That information may be of use in arriving at cogent inferences about the individual, eg, the individual is found in the company of persons found to have illicit drugs in their possession. If that individual's details are hidden in individual officer's notebooks and only numbers on the Drug [Dog] Handler's running sheets, those kinds of inferences cannot be drawn.⁹¹

It is unclear whether the information sheet is to be interpreted as applying only to Information Reports or whether it also extends to other types of COPS records. Some police consider that although no 'Information Report' should be recorded in relation to searches which do not result in the location of drugs and which involve no admissions of drug involvement, an 'Event Record' detailing the search is still appropriate. For example, at one police briefing we attended, a senior officer advised police that an Event Record should be created for every person searched. He advised that officers should not create an Information Report but must create an Event Record. He told officers that it was unfair to do an intelligence report on 'clean skins' because "you know all they tell you on the [police] radio is that there's a drug related intel" and it was unfair if the person had not really had anything to do with drugs.⁹²

One police command has informed us that searches of persons following drug detection dog indications will be recorded as a 'Person Search' on the COPS system. It appears that this practice has been adopted for all such searches in this command whether or not an offence is detected or other intelligence is available about the person.⁹³

NSW Police has recently informed us⁹⁴ that on 18 May 2004, a statewide memo was issued, stating in part:

Police are directed to record person searches following positive drug dog indications as Events under the category 'Person Search'. This replaces the previous common practice of recording such searches as 'Street Offences' or using the various categories available under Information Reports. This applies regardless of whether or not drugs or other items are found or admissions made. . .

Police retain the discretion to create an IR regarding a drug dog search provided that it meets the creation criteria specified in the Corporate Information Report Policy.

⁹¹ Correspondence from Local Area Commander, 20 December 2003.

⁹² Ombudsman observer notes, December 2003.

⁹³ Correspondence from Local Area Commander, 13 January 2004.

⁹⁴ Email, 1 June 2004.

*The 'Filing Information Reports following Drug Dog Detections' Policy is currently being amended to reflect the changes mentioned . . .*⁹⁵

Since we have only very recently been informed of this memo we have not yet been able to determine the extent to which it addresses the issues raised in relation to the recording on COPS of incidents in which no drugs are found on a person and no admissions made. The memo clearly directs police to record all such incidents as 'Person Searches'.

Where information reports are made, how long do they remain on COPS?

We also asked police to advise us about the longevity of Information Reports on COPS. We were provided with a copy of the NSW Police 'Policy for the Creation, Classification, Evaluation, Storage, Review and Destruction of COPS Information Reports'.⁹⁶ The policy notes the importance of balancing the interests of the 'subjects' of the reports with policing needs and legal requirements.⁹⁷ The policy states:

*An IR [Information Report] is an electronic record containing information received by [NSW Police] staff. The primary source of this information may be police, other agencies, community sources, registered informants or members of the public. Information contained in an IR should relate to persons, organisations, vehicles, locations or other entities and their involvement, links or relationships to crime and/or public safety. The purpose of creating and storing COPS IRs is to facilitate the production of criminal intelligence and to inform tactical, operational and strategic policing decisions.*⁹⁸

In relation to review and possible disposal, the policy states:

*All IRs entered on to COPS must be reviewed to ensure they are current, relevant and accurate... Within [NSW Police], personal information is to be reviewed on a regular basis and should be disposed of if the initial justification for its collection ceases to apply.*⁹⁹

Information reports have a default review timeframe of 12 months, which may be altered by the intelligence officer at the local area command.¹⁰⁰ However, we know of one information report created in relation to a search in June 2002¹⁰¹ where no drugs were found, no admissions were made and there was no relevant intelligence on the person searched. The person complained soon after the search and was advised by the local command that the record would be reviewed and deleted after 12 months. More than 18 months after the search, the report was yet to be deleted from COPS. We have recently notified the relevant local area command of this matter and await a response.

⁹⁵ D.B. Madden, Deputy Commissioner, Statewide memo, 18 May 2004.

⁹⁶ NSW Police Service, Information and Intelligence Centre, August 2001.

⁹⁷ NSW Police Service and Intelligence Centre, *Policy for the Creation, Classification, Evaluation, Storage, Review and Destruction of COPS IRs*, August 2001, p.2, per Nola Watson, (then) Director IIC.

⁹⁸ *Ibid*, at p.8.

⁹⁹ *Ibid*, at p.26.

¹⁰⁰ *Ibid*, at p.26.

¹⁰¹ This incident occurred prior to the release of the NSW Police guidelines about Information Reports.

Questions for consideration

- 6(c) What, if any, records should be created on the police COPS system in relation to a person searched following an 'indication' by a drug detection dog, if no drugs were found and no admissions or other information arouses police suspicion in relation to the person?
- 6(d) What are the advantages and/or disadvantages of making records of these search incidents?
- 6(e) Where records are made of these search incidents, when (if at all), should these records be removed from COPS? What systems are in place to ensure records are appropriately removed from COPS in a timely manner and according to NSW Police policy?

Fearful or anxious reactions to the drug detection dog

On a number of occasions during our observations of the use of drug detection dogs, we have observed people behaving as if they were afraid of the dog. Sometimes this appeared to be no more than a reaction to the unexpected presence of a dog. On other occasions people were noticeably fearful of the dog or anxious in its presence. Many who reacted in this way appeared to be of Asian or Arab background.

At one police briefing we attended in an area of Sydney with a relatively high proportion of Arab and Asian residents, a police officer asked the handler what the handler would do if someone reacted to the drug detection dog in that way. The handler replied that Asian people and some religious groups – especially in that location – may be afraid of the dog. The handler attempted to deal with this concern by saying patrolling police would be told if there were drugs on the person, and this would stop police from acting simply on the basis of a person's apparent fear of the dog. Avoidance of the drug detection dog or a fearful reaction might not indicate that the person has drugs on them.¹⁰²

We asked Keysar Trad, (then) Vice-President of the Lebanese Muslims Association whether there might be any religious basis for the fearful reactions of some women we had observed. Mr Trad told us that some Muslim people might want to keep away from the drug detection dog because contact with the dog would require that they wash prior to prayer or attendance at a Mosque. Many Muslims believe that dogs and similar animals are unclean.¹⁰³

Targeting and unfair discrimination

Concerns about infringement of civil liberties also extend to claims that the use of drug detection dogs unfairly discriminates against particular communities. Members and representative organisations of the gay community in particular, have cited the frequency of police use of drug detection dogs in Oxford Street, Darlinghurst as evidence of inappropriate targeting.

¹⁰² Ombudsman observer notes, April 2003.

¹⁰³ Meeting with Keysar Trad, 2003. Information confirmed by email August 2003.

We interviewed two people who had been searched by police following an indication by a drug detection dog. Both were gay and lived in areas of Sydney with high populations of gay residents and visitors.

*... if I hadn't lived in [name of suburb] I wouldn't get caught. If I lived in another neighbourhood – you don't even have to go as far as Mosman or Vaucluse either. When they are marching with their dogs on [name of street] I think most people in Sydney are aware that's where the gay neighbourhoods are, and most of the gay venues. Just putting two and two together, it looks like they are targeting people there.*¹⁰⁴

*I feel doubly victimised by being gay and living in [name of suburb].*¹⁰⁵

Although both of these men were searched *prior* to the commencement of the Drug Dogs Act, the suburbs in which they were searched were amongst the top 10% of suburbs in which the drug detection dogs most frequently made indications in the first 12 months of the legislation.¹⁰⁶

Others have argued that the provisions in the Drug Dogs Act which specify the ability to use the drug detection dogs without warrant on public transport unfairly targets the poor and the young who rely on public transport for legitimate purposes.¹⁰⁷

The specific inclusion of dance parties and concerts in the legislation has also been argued to discriminate against the young. One MP commented during the parliamentary debate:

*These are places where young people hang out, and it is young people who will bear the brunt of this legislation. Mark my words, this legislation will create a generation of citizens who hate police.*¹⁰⁸

According to the 2001 National Drug Strategy Household Survey, 16.9% of the Australian population had used illicit drugs in the 12 months prior to the survey. The survey also found that 35.5% of 20-29 year olds, and 27.7% of 14 – 19 year olds had used illicit drugs in the last 12 months.¹⁰⁹

Information about the ages of people searched is set out in the summary data in Chapter 5 (see Figure 7 on page 21). The records of persons searched during the first year of operation of the Act show that 5.8% (237 of 4078) of people searched were 17 years or younger. 68.2% (2782 of 4078) of persons searched were between 18 and 34 years of age, and 36.4% (1486 of 4078) were between 18 and 24 years of age.¹¹⁰

We asked a senior police officer from the Dog Unit about claims that the use of drug detection dogs discriminated against certain groups of people. The officer stated:

I completely disagree with that. I am yet to find a dog that discriminates against anyone. Our police dogs don't know whether a person is black, brown or brindle, whether they're

¹⁰⁴ Interview 4 June 2002.

¹⁰⁵ Interview 4 June 2002.

¹⁰⁶ See Chapter 4 'Summary Information'.

¹⁰⁷ Ms Lee Rhiannon, MLC, and The Hon. Richard Jones, Legislative Council Hansard, 13 December, 2001, pp.20205 - 20209. See discussion of targeting on trains and railways in Chapter 11 'Use of Drug Detection Dogs On Trains And At Railway Stations'.

¹⁰⁸ The Hon. Peter Breen, Legislative Council Hansard, 13 December 2001, p 20212.

¹⁰⁹ Australian Institute of Health and Welfare, *2001 National Drug strategy Household Survey: First results*, 2002, p. 20.

¹¹⁰ For more information about the ages of persons searched see Chapter 4 'Summary Information'.

*Asian, Australian, European or anything else. The police dog is only interested in one thing – the target scent ... We have not got a target group at all. The dogs only have a target odour – if someone is emitting that target odour the dog will alert to them. If they haven't the dog will completely ignore them.*¹¹¹

Another senior Dog Unit officer said that there must be drug related intelligence about licensed premises, streets and other places in which the drug detection dogs are used. He explained that this is the only basis for targeting a location for the use of the drug detection dogs.¹¹²

While the drug detection dog might not discriminate between people on any basis besides how they smell, searching police might alter their behaviour depending on how a person looks or their attitude. Officers' comments to us included:

And the police look at someone and because they're not a junky looking person, because they might be in a suit or something the police'll just give them a quick search ... I'm sure you guys [gesturing to other police officers] ... have got blokes in suits and that, and they [police] won't search them anywhere near as good.

... They just say turn your pockets out and that's it.

*A lot of them go on the person's attitude too but people sort of act really innocent and say, 'Oh, I don't know why the dog's indicated on me'. I've noticed that the police don't seem to search them the same way they do someone else. They sort of take their word for it.*¹¹³

Occasionally, during our observational research dog handlers have appeared to lead the drug detection dog towards a particular person that they wished the dog to sniff.¹¹⁴ However, while this leading of the dog may have been because police suspected on the basis of the person's appearance or location that the person may have been carrying drugs, the dog's reaction did not appear to be manipulated in any way.

Targeting was mentioned at only one of the briefings we attended. On this occasion the handler made it very clear to police that a person would not be targeted just because the police asked the handler to do so.

Questions for consideration

- 6(f) Is there any evidence to suggest that police are unfairly targeting particular groups, such as the gay and lesbian community, Aboriginal or ethnic groups, or young people, in their deployment of the drug detection dogs? If so, please describe.
- 6(g) What actions could police take to minimise any perceptions that certain groups in the community are being unfairly targeted by the use of the drug detection dogs?
- 6(h) When deploying drug detection dogs, what factors should be taken into account to strike the right balance between the fear of dogs experienced by some groups and members of the community, and the policing of drugs offences.

¹¹¹ Interview, 9 May 2003.

¹¹² Interview, May 2003.

¹¹³ Interviews with police, May 2003.

¹¹⁴ Ombudsman observer notes, December 2002.

Chapter 7. Harm minimisation

Introduction and definitions

While 'drug dealers and couriers' were a target of the Drug Dogs Act, the impact on users and treatment programs was also considered when the legislation was introduced. In his second reading of the Bill the (then) Police Minister Michael Costa said:

This legislation is consistent with the Government's approach to harm minimisation for low-level drug users. Obviously, some of those users will be detected in police operations ...

It is important that those offenders appreciate the enhanced capacity police have to undertake drug detection and for drug users to be diverted to appropriate schemes. They may seek assistance to stop using drugs, and that is one of the clear benefits of this legislation. The New South Wales Government has led the way in treatment of persons who are using these harmful substances on the one hand, whilst cracking down hard on the supply of them. No justification is necessary for police concentration on stopping the use of prohibited drugs where they can, and a range of options are available to police once they have identified that a person is carrying a prohibited drug to divert persons into treatment.¹¹⁵

NSW Police published its 'NSW Illicit Drug Law Enforcement Performance Indicators' ('The NSW Performance Indicators') in April 2002. This document, was developed as an initiative of the Drug Summit¹¹⁶ and emphasises the reduction of harm caused by illegal drugs as a 'central objective of policing'.¹¹⁷

The NSW Performance Indicators cite three main components of harm minimisation:

- Harm reduction;
- Supply reduction; and
- Demand reduction.

The NSW Performance Indicators also set out five goals for drug law enforcement. These are:

- To address organised crime and corruption;
- To address drug-related property crime (including robbery);
- To address drug-related violence, intimidation and extortion;
- To address disruptions to public amenity caused by drug use and dealing; and
- To address drug-related public health problems.¹¹⁸

A police perspective on 'harm minimisation' is set out in an article explaining the 'cannabis cautioning' scheme to NSW Police. The article uses a National Drug Strategy Committee definition which emphasises that harm minimisation attempts to reduce the adverse health, social and economic consequences of drugs by 'limiting the harms

¹¹⁵ The Hon. Michael Costa, MLC, Legislative Council Hansard, 6 December 2001, p.19745.

¹¹⁶ NSW Government, *NSW Drug Summit Communiqué*, May 1999, Recommendation 9.11.

¹¹⁷ NSW Government, *NSW Illicit Drug Law Enforcement Performance Indicators*, April 2002, p.5.

¹¹⁸ NSW Government, *NSW Illicit Drug Law Enforcement Performance Indicators*, April 2002, p.6.

and hazards of drug use for both the community and the individual'.¹¹⁹ It also adds that this approach, 'accepts that drug use is well entrenched in modern life and that it is unrealistic to expect that harmful drug use will ever be completely eradicated.'¹²⁰

Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, has pointed to the tension between these types of goals or objectives and has emphasised the importance of balance. According to Dr Weatherburn:

*. . . the single-minded pursuit of some of [these objectives] will place at risk the achievement of others . . . What matters then, in judging the overall performance of DLE [Drug Law Enforcement] is not the level of success in achieving any one objective but the level of success in achieving all . . .*¹²¹

The idea of drug harm minimisation is perhaps more complex than it appears at face value. The notion of harm can encapsulate many things. Many of the harms associated with drugs (both illicit and legal) have been summarised in the National Strategic Drug Framework and include:

- Drug related deaths;
- Health problems associated with cannabis, including paranoia, memory loss and long-term effects of increased risk of psychotic symptoms;
- Health problems associated with amphetamine use, including abdominal cramps, nausea, headaches, memory loss and long-term effects including weight loss, difficulty sleeping, reduced immunity to infection and mental health problems;
- Health problems associated with heroin, including difficulty concentrating, risk of overdose and long-term effects of building up tolerance (and increasing the risk of overdose) and conditions associated with withdrawal from use;
- Health problems associated with ecstasy, including loss of appetite, abnormally fast heart beat, increased jaw tension and grinding of teeth, insomnia, fluid retention and dehydration;
- Health problems associated with injection of drugs, including bacterial infections, abscesses, inflamed veins, and thrombosis and occlusion of arteries. In addition, injection brings with it increased risk of blood born infections such as HIV/AIDS and Hepatitis C and B;
- Intangible social costs such as damage to family and other relationships;
- Physical harms to foetuses because of drug use during pregnancy;

¹¹⁹ A/Sergeant L Mullan, 'Cannabis Cautioning Scheme' (2000), *Policing Issues and Practice Journal*, January 2000, 5, at p.5. A/Sergeant Mullan was involved in the development of the original guidelines and education package for the Cannabis Cautioning Scheme.

¹²⁰ *Ibid.*

¹²¹ Weatherburn, D, 'Performance Indicators for Drug Law Enforcement', *Contemporary Issues in Criminal Justice, Crime and Justice Bulletin*, no.48, p.3.

- Injury to members of the public e.g. injuries from discarded needles, or dangerous behaviour of drug users such as driving while intoxicated;
- Harms to friends and family of drug users, including dissolution of relationships, neglect of children of drug users;
- Harms associated with violent and property crime committed to support drug habits or because of intoxication; and
- Economic costs including costs associated with prevention, treatment loss of productivity in the work place, property crime, theft, accident and law enforcement activities.¹²²

The Framework also states:

*It is important to recognise that policing initiatives do have an impact on the success of public health initiatives and the health of individuals who use drugs, just as public health initiatives have an impact on criminal activity.*¹²³

According to the Bureau of Crime Statistics and Research (BOCSAR), there is evidence that some drug law enforcement practices, such as aggressive street policing of drugs, may be 'inimical to public health'. Street policing and drug 'crackdowns' have been associated with unsafe injection practices, short-term and longer term displacement of drug activity, and unsafe needle disposal.¹²⁴

It is not possible for this review to investigate in detail the relationship between the use of drug detection dogs for drug law enforcement and the myriad possible harms of drugs. However, there are a number of issues within the scope of a discussion of harm minimisation that have been brought to our attention. These issues are set out below.

Impact on services for the health and welfare of drug users

Sydney Medically Supervised Injecting Centre

The Sydney Medically Supervised Injecting Centre (MSIC) commenced its third year of clinical operation on 7 May 2003.¹²⁵ The MSIC was a NSW Government initiative based on a recommendation of the NSW Drug Summit.¹²⁶ According to Dr Ingrid van Beek, Medical Director of the MSIC, '[t]he aim of the MSIC is to reduce the public health and public order issues arising from unsupervised and public injecting at a local community level'.¹²⁷ In its first two years of operation, 4,719 registered intravenous drug users visited the MSIC. The MSIC also effectively managed 553 drug overdoses,

¹²² Commonwealth of Australia, Ministerial Council on Drug Strategy, *National Drug Strategic Framework, 1998-99 to 2002-03, Building Partnerships*, (1998), pp 9 – 11.

¹²³ Commonwealth of Australia, Ministerial Council on Drug Strategy, *National Drug Strategic Framework, 1998-99 to 2002-03, Building Partnerships*, (1998), p.17

¹²⁴ See for example, D. Weatherburn, B. Lind, L. Forsythe, (1999) *Drug Law Enforcement: Its effect on Treatment and Injection Practices*, NSW Bureau of Crime Statistics and Research, Sydney, p.7 – 8; L. Maher and D. Dixon (2001) 'The Cost of Crackdowns: Policing Cabramatta's Heroin Market', *Current Issues in Criminal Justice*, Vol 13, No 1.

¹²⁵ *Face Up, Newsletter of the Sydney Medically Supervised Injecting Centre (MSIC)*, Issue 4 July, 2003, p3.

¹²⁶ NSW Parliamentary Drug Summit, May 1999.

¹²⁷ Ingrid van Beek, 'The Sydney Medically Supervised Injecting Centre: A Clinical Model', *Journal of Drug Issues*, March 2003, p.625.

which may otherwise have occurred in an environment unlikely to offer prompt medical assistance. No fatalities resulted from these overdoses.¹²⁸

It has been claimed that drug detection dogs have been used near the entrance of the MSIC. According to Ms Clover Moore MP, Member for Bligh (where the MSIC is located):

This conflicts with the lawful purpose of this government-funded health facility, which is designed to improve the health of injecting drug users and improve the amenity of the surrounding area.

Drug detection dogs and other invasive policing strategies undermine the Government's harm minimisation goals by deterring potential users of the MSIC who would have been in contact with and carry illicit substances.

The Drug Summit Legislative Response Act 1999 which established the MSIC amended the Drug Misuse and Trafficking Act 1985 to exempt users of appropriate quantities of drugs in a licensed injecting centre from criminal liability; and the use of drug detection dogs so close to the MSIC or other needle programs is inappropriate.¹²⁹

Drug detection dogs may deter people from using the medically supervised injecting room facilities. The use of such facilities takes needles and drug users who have just injected (when they are most likely to be 'nodding off' and obviously intoxicated) out of public view. While there is a police protocol in relation to the policing of the injecting room, it does not make any commitment to avoid policing in the immediate vicinity of the facility.¹³⁰ According to Ms Moore, police have conducted drug detection dog operations 'directly adjacent to the facility' and this resulted 'in users being driven away from the facility'.¹³¹

It should be noted that some police contact with clients of the MSIC is probably unavoidable. Police often patrol in the vicinity of the Kings Cross Railway Station, which is located close to the MSIC, and on the main street. Seeking a balance between drug-related policing of the Kings Cross CBD and minimising averse impact on the MSIC requires police to appropriately exercise their discretion and judgement. We recognise that drug law enforcement in this environment is a complex and challenging job.

We spoke to Dr Ingrid van Beek, Medical Director of the MSIC, about the use of drug detection dogs in the vicinity of the centre. Dr van Beek commented that the impact of the drug detection dogs was greatest when police first began to use the dogs in patrols of the main street of Kings Cross:

Well, particularly when it started, which was soon after we opened, yeah, there was a huge impact. ... Basically the main street would be cleared of drug users for about 2 or 3 hours so we would go from seeing, you know, 20 people an hour to seeing nobody for several hours. Yes, from our normal levels of activity to virtually nil. ... So it certainly had a very dramatic effect as far as displacing these drug users from the main street, presumably back into the back streets.¹³²

¹²⁸ Ibid.

¹²⁹ Correspondence from Ms Clover Moore, MP, Member for Bligh, 4 December, 2002.

¹³⁰ NSW Police, *Guidelines for Police for the proposed Medically Supervised Injecting Centre at Kings Cross*. Although the title states 'proposed' these guidelines are still current.

¹³¹ Ms Clover Moore, MP, Legislative Assembly Hansard, 6 December, 2001, p.19879.

¹³² Interview, 15 April 2004 and 27 April 2004.

Dr van Beek also commented on the good working relationship that the centre enjoyed with local police and also that it appeared that clients of the MSIC had found ways around detection by the drug detection dogs and were no longer significantly deterred from utilising the MSIC during drug dog operations.

Interestingly, the drug dog operations were thought to impact on clients of the MSIC in other ways. Dr van Beek commented:

. . . prior to the drug dogs [being] up here, a lot of the users . . . would fund their drug use by selling small quantities of cannabis. We're talking about fairly low level street dealing here - you know just small quantities of cannabis that they are selling to raise funds - and once the dogs turned up, because the dogs are particularly good at detecting cannabis, . . . that was a problem for them, obviously. So some of them would have shifted away from moving cannabis, undoubtedly to other forms of income generating crime such as break and enter, prostitution and so on. That's been a shift.¹³³

NSW Police has told us that 'acquisitive crime' in Kings Cross has fallen to 'record low levels'.¹³⁴ We hope to examine relevant police statistics about such crime rates in the final stage of our review. At this stage we have not investigated any overlap between the use of drug detection dogs and the location of syringe and needle exchanges. We are interested in your views and experiences in relation to the use of drug detection dogs in the vicinity of such facilities.

Question for consideration

7(a) What impact, if any, does police use of drug detection dogs have on the Medically Supervised Injecting Centre and other facilities and services designed to improve the health and welfare of drug users?

Impact of drug detection dogs on the behaviour of drug users

At a consultation with community and legal groups that we conducted soon after the commencement of the Drug Dogs Act, the concerns raised included:

Recreational drug users, concerned about being detected carrying drugs, might resort to taking a larger amount of drugs in one dose rather than staggering their consumption over a longer period. Taking larger doses may increase the risk of overdose and other unpleasant or dangerous physical reactions. Other drug users may respond by purchasing drugs at the point of consumption where they may be less likely to know the supplier and the quality or type of drug obtained. Such actions have been associated with police use of drug detection dogs in areas known for recreational drug use.¹³⁵

In relation to this type of behaviour, one senior police officer was quoted in the media as saying:

Obviously, if you take the drugs, the dogs won't be able to spot you but you are at serious risk if you take drugs all at once . . . On Saturday night when the lights went up,

¹³³ Interview, 15 April 2004 and 27 April 2004.

¹³⁴ NSW Police Comment on NSW Ombudsman Draft Discussion Paper, 8 June 2004, p. 11.

¹³⁵ T. Moore, 'The cold nose of the law', *Sydney Star Observer*, Issue 599.

*there were people throwing things on the floor and popping things in their mouths, but we as a Service can only tell you that it is dangerous and will seriously risk your health.*¹³⁶

Injecting drug users might discard syringes in public places rather than take them back to needle exchanges for safe disposal, because they fear that carrying the needle might expose them to detection by a drug detection dog. While the dogs are not trained to detect needles, and possession of a needle is not an offence in NSW, the dogs are able to detect minute 'residual' quantities of drugs on a user's clothing, skin or injecting equipment. This might lead to a search in which injecting equipment is discovered. One study in Cabramatta reported instances of police destroying needles and syringes found during searches.¹³⁷

Failure to carry clean or personal-use only needles may encourage needle sharing and re-use of dirty needles, which in turn increase the risk of spreading blood-borne viruses and disease. Discarding or stashing needles immediately after use rather than returning them to needle exchanges or using other disposal facilities can also pose risks.

During our observational research we have noted that police occasionally located needles and 'fit kits' during searches. We have not noted the systematic confiscation or destruction of needles by police in situations where no offence was detected.

Police efforts to target people in possession of drugs might encourage drug users to inject their drugs as soon as possible after purchase to avoid detection. If drugs are purchased in public places then injection might also be more likely to occur in nearby amenities or parks. This, in turn, might impact on community use of those places.

On the other hand, the visibility of police through intensive street based drug law enforcement operations could increase public perceptions of safety and make members of the public more confident to use an area or facility. The focus of the Drug Dogs Act on public transport is partially aimed at increasing the ability of members of the public to use these public facilities without fear, and without harassment by drug dealers.

Questions for consideration

- 7(b) How does NSW Police drug law enforcement using drug detection dogs contribute to or detract from the NSW Police implementation of harm minimisation objectives?
- 7(c) Are there ways that the use of drug detection dogs might better facilitate, or interfere less with a harm minimisation approach?

¹³⁶ *Sydney Star Observer*, 28 July 2001, cited in T. Moore, 'Why aggressive policing of simple drug possession needs to be kept on a tight leash! Or Further Adventures with Spot the Dog', <http://www.nswccl.org.au/docs/pdf/Spotthedog.pdf>

¹³⁷ L. Maher & D. Dixon, 'The Cost of Crackdowns: Policing Cabramatta's Heroin Market' (2001) Vol.13, No.1 *Current Issues in Criminal Justice*, at p.7.

Drug diversion programs and drug detection dogs

Cannabis cautions

The recent introduction of cannabis cautioning has extended the options available to police.

The NSW Cannabis Cautioning Scheme (CCS) is a NSW Drug Summit Initiative which provides for the formal cautioning of adults apprehended for minor cannabis use and possession offences . . . The CCS provides police officers with the discretion to caution adult offenders in relation to the use and possession of up to 15 grams of dried cannabis, and the possession of equipment for the administration of cannabis. It aims to divert cannabis users from the court system and to encourage them to consider obtaining advice and/or treatment for their cannabis use. A cannabis caution may be issued to any given offender on two occasions. Any person apprehended on a third occasion for cannabis use or possession must be charged.¹³⁸

During our consultation with community groups it was suggested that police might not be making full use of the cannabis cautioning scheme when they locate people in possession of small amounts of cannabis.¹³⁹ Our analysis of Dog Unit records for the first year of the Drug Dogs Act showed that police issued 580 cannabis cautions from a total of 940 incidents in which cannabis was found during a search. This represents almost 61% of 'cannabis incidents'.

The remaining 360 incidents in which cannabis was found but no cannabis caution issued have not been subject to a detailed analysis at this stage. However, it should be noted that not all persons found in possession of cannabis are eligible for a caution. For example:

- The person must be found with an amount of cannabis of no more than 15 grams and/or equipment for the use of cannabis;
- The person must be an adult over 18 years of age (3.4% of persons found in possession of cannabis in the first year received a juvenile caution);
- There must be no other offence detected at the time the cannabis is detected (46 people were in possession of another drug as well as the cannabis);
- An offender must consent to the caution and sign the cannabis caution notice;
- The drug must be dried cannabis (not resin, oil or living plants);
- Drugs must be for personal use only;
- The offender must admit to the offence;
- The caution must be appropriate;

¹³⁸ NSW Police Response to Questions on Notice – Commonwealth Parliament Committee on Legal and Constitutional Affairs, Crime in the Community Inquiry, February 2003, p2.

¹³⁹ Concerns raised at a consultation with community and legal groups, 21 March 2002.

- The offender cannot demand the caution – the caution is at the discretion of the police officer;
- The identity of the offender must be confirmed; and
- The person must not have convictions for drug related offences, or offences involving violence and/or sexual assault.¹⁴⁰

To receive a caution an offender must have no more than one previous caution. Some additional criteria apply to a second caution under the scheme including that the offender *must* contact the Alcohol and Drug Information Service (ADIS) within 14 days from the issue of the second caution. ADIS will then conduct a 'mandatory telephone health education sees on cannabis use' with the offender.¹⁴¹

A NSW Police evaluation of cannabis cautioning included an audit of COPS records for all persons cautioned or charged for cannabis use or possession in four NSW Police regions during the last six months of 2000. It found that 98% (293 of 299) of people charged with an offence (rather than cautioned) were ineligible to receive a caution.¹⁴² According to the NSW Police, Drug and Alcohol Co-ordination Unit, more than 9100 cannabis cautions have been issued in the first three years of the scheme. This represents "one quarter of all formal police actions for minor cannabis offences".¹⁴³ The Unit's analysis also showed that over the three year period police issued cautions to 95% of persons who were eligible to receive a caution. We have also been advised by a senior police officer that very few individuals who have received a cannabis caution come to police attention again for a cannabis-related matter and very few second cautions are issued.¹⁴⁴

Other cautioning and diversion schemes

Police have a range of diversionary options in NSW to deal with drug and some other offenders.

The Magistrate's Early Referral Into Treatment (MERIT) program, for example, is a 'court based' program whereby offenders undertake assessment and/or treatment as a voluntary condition of bail. The MERIT Program applies not only in relation to drug offences but to a range of drug-related offences where the offender has a 'demonstrable drug problem'. Participation in the program is taken into account by courts on sentencing.¹⁴⁵ MERIT began as a trial and is being progressively 'rolled out' across NSW.

Police have an important role in the program as a point of early referral for assessment. At the time of arrest, police identify suitable persons for the program and can bail these

¹⁴⁰ This is not a full list of the cannabis cautioning criteria. Information obtained from 'New South Wales Police Service Cannabis Cautioning Scheme' pocket guide.

¹⁴¹ *Ibid.*

¹⁴² 'Implementation of the NSW Cannabis Cautioning Scheme', NSW Police presentation to the ANZOC Conference, 31 September – 2 October, 2003.

¹⁴³ 'Drug Diversion, Discretion and Policing in NSW', NSW Police presentation to the ANZOC Conference, 31 September – 2 October, 2003.

¹⁴⁴ Interview with senior police officer, 16 March 2004.

¹⁴⁵ Magistrates' Early Referral into Treatment (MERIT) Program, *NSW Police Intranet*, Drug and Alcohol Co-ordination, updated March 2003.

offenders for assessment by the 'MERIT' team prior to their court appearance. Police may also informally refer to the program offenders not subject to bail.

It is unclear at this stage whether or how often police have made use of the MERIT scheme in relation to persons found in possession of drugs as a result of an indication by a drug detection dog. It is unlikely that many formal MERIT referrals are associated with drug dog detections because very few of these people are arrested and bailed. We will look into the frequency of MERIT referrals for persons found with drugs as a result of drug dog indications in the final stage of our review.

Another drug diversion program piloted following the 1999 NSW Drug Summit was the Drug Offenders Compulsory Treatment Pilot (DOCTP). The aim of the program was to:

- Divert minor drug users from court;
- Direct drug users into drug assessment and appropriate treatment services;
- Assist offenders in overcoming their drug problems; and
- Prevent drug use leading to other criminal offences.

This program was trialled in two areas of NSW for 12 months and applied to cannabis resin and oil, cocaine, heroin, ecstasy, amphetamines, LSD and implements to use drugs. The trial was not extended beyond the 12 months for a range of reasons, and was replaced by the MERIT Program.

NSW Police is also currently trialling the use of penalty notices known as Criminal Infringement Notices (CINs) to divert minor (non-drug) offenders from court. People who receive a CIN are given the option of paying a fine or electing to take the matter to court. One of the aims of this scheme is to reduce the amount of time police spend processing minor offences for court.¹⁴⁶

NSW Police also have a range of cautioning and warning options in relation to young offenders. These include formal warnings, cautions and youth conferencing and are available for a range of minor drug offences.

In the latter part of our review we will examine the types of penalties received by persons found, as a result of drug dog indications, to be in possession of small quantities of drugs for personal use.

In light of:

- efforts to reduce police time spent processing minor criminal matters for court;
- the success of the cannabis cautioning scheme in diverting minor drug offenders from court; and
- the predominantly small amounts of drugs found on persons as a result of drug detection dog indications;

¹⁴⁶ The NSW Ombudsman is reviewing the implementation by police of the CINs trial. For further information please see our discussion paper, *Put on the Spot – Criminal Infringement Notices Trial*, September 2003.

it has been suggested that there may be scope to consider extending police discretion to use cautions, to persons found carrying very small quantities of drugs other than cannabis. This is a highly charged issue, and ultimately one for the Parliament to determine, where the balance between various policing, legal, health and cultural issues is very fine. However, given that persons carrying these small quantities are now coming to police attention, when previously they may not have, it is appropriate for submissions to be requested for consideration in this review prior to any report being finalised for Parliament's consideration.

Questions for consideration

- 7(d) What, if any, scope is there for the diversion from court of some persons found in possession of small amounts of drugs other than dried cannabis leaf?
- 7(e) What might be the advantages and/or disadvantages of diverting some of these offenders from court?

Chapter 8. Policing issues

Proportion of time spent by drug detection dogs and handlers 'in the field'

One issue raised by drug detection dog handlers at a focus group discussion¹⁴⁷ on 28 May 2003 related to handlers' frustrations that they were not spending enough time using the dogs for drug detection work. The following comments from three different handlers were generally supported by the members of the focus group and illustrate their concerns in this area:

Also, on a day like today it's not uncommon to have us, you know, more or less sitting here, doing nothing. How we can we can justify sitting around doing nothing here when there's people doing that kind of thing [engaging in drug related activity] – we could have a drug dog in this region every day . . .

That's the hard thing too that management won't let us go . . .

They've got a bunch of people, like we've got 14 people here now or 20 people and they were specially selected for our 'get up and go', and what their station said about their work performance. They've got them here and now they expect us to sit around and do nothing and it's like we just want to up there and go . . .

Does the community know, does the government know how much, how much time is wasted by us sitting here and not going out and doing what we are paid to do?

Management of the NSW Dog Unit has reported to us that some handlers believe that prior to the introduction of the legislation, operations were more frequent, successful and less prohibitive in terms of where, when and how the operations were conducted. These handlers are reportedly frustrated by aspects of the Drug Dog Act.¹⁴⁸

We asked handlers for documentation of how much time they spent on different aspects of their work. They agreed to provide us with a list of their daily rostered activities for the two months preceding the focus group discussion (April and May 2003). We have analysed this information and the results are set out in Table 4 below.

It should be noted that these results are likely to underestimate the time spent in the office performing office or kennel duties, or training because we have allocated a whole day to the activity listed for that day. For example, if a handler went to a search warrant on a particular day, that whole day has been allocated to the warrant, even if only a few hours were spent on this task and the remaining time was spent at the office.

It should also be noted that we have not checked to see whether the months of April and May 2003 are typical months in terms of the amount of work available to handlers. The NSW Dog Unit has recently told us that although it concurs with the data presented in this paper the information should be considered with some caution. According to the Dog Unit, a number of handlers were being trained during this period and the figures do not reflect the usual ratio of drug detection work in the field compared to office and training duties. In addition the Dog Unit reports that there was a higher than average job cancellation rate and a comparatively low number of searches and drug finds over the two months. We will further examine dog handler

¹⁴⁷ Focus group of drug detection dog handlers, May 2003

¹⁴⁸ NSW Police Comment on NSW Ombudsman Draft Discussion Paper, 8 June 2000, p.15,16.

roster information in the final stage of this review to obtain a clearer picture of how handlers' time is apportioned.

In addition, only eight of 14 handlers were able to complete the roster information sheets for us. Notwithstanding these limitations, the data provided does lend support to the impressions of handlers that they are not spending enough time 'in the field'.

We grouped the 13 tasks itemised by handlers into the following four broad categories:

- Drug detection work: Vehicle searches, operations, search warrants, travel.
- Office or training: Kennel duties, supervision, office duties, training.
- Non-work time: Rest, sick, other leave.
- Other: Court, public relations.

The results were as follows:

Table 4 Activities of drug detection dog handlers (April – May 2003)

Source: Drug Dog Handler roster information, April & May 2003.

Activity	Days	% of all work days
Time in office or training	176	62%
Time spent on drug detection	99	37%
Other	9	1%
All work activities	284	100%

Clearly it is necessary for handlers to spend a certain amount of time back at the police station to do administrative tasks, COPS entries, train the drug detection dogs and ensure that kennels are maintained. The question is whether handlers spend an inappropriate amount of time on these duties.

During our focus group, some handlers raised the possibility that they could be stationed out in the regions on days when there was no pre-planned operation or warrant to attend. This way they could respond quickly to search warrants or vehicle search requests which required their assistance on an urgent or more spontaneous basis. Under this scheme, handlers would let relevant officers in local commands know that they were in the area so that officers were encouraged to make use of their services.

Questions for consideration

8(a) Are drug detection dog handlers spending an appropriate amount of time 'in the field'? What might be done to increase the amount of time handlers spend doing drug detection work with their dogs?

8(b) Is it feasible for handlers to spend some time stationed in particular regions? What are the advantages/disadvantages of this option?

Officer safety

Drug detection dog handlers, like many other operational police, often work in crowded environments where a proportion of people are intoxicated and/or drug affected. Unlike other police, handlers need to focus on their drug detection dog. This reduces their capacity to look out for potential threats. Handlers also use one hand to control their drug detection dog, and are therefore less able to defend themselves if threatened. Drug detection dogs are not trained to attack and will not defend themselves or their handlers.

Handlers regularly advise police at briefings that they require at least two police with them at all times. Operation commanders often reinforce this message. However, in practice we have noted on a number of occasions that handlers are left on their own on trains and at licensed premises.

At one operation we observed, the handler made clear at the police briefing that he required police back-up. Our observer's notes indicate that the handler:

Told police they had 'two roles: watch me and watch the crowd'.

Safety: 'My role is to keep my eye on the dog and keep the dog safe. Your role is to watch my back'.¹⁴⁹

During that operation, the handler was twice left on his own for short periods. On one occasion on licensed premises the drug detection dog indicated a man and the handler cautioned the man and had to lead him out of the crowd to wait for police to conduct the search. On the other occasion at the same venue, the handler followed a man into the men's toilets, with no police back up. Our observer stood outside and watched a number of men go in and out of the toilets. Eventually the handler came out of the toilets.

On another operation in Sydney's inner west, the handler advised the police briefing that he needed two officers with him at all times. During the operation, however, he was left alone and followed the drug detection dog as it pursued a scent in the men's toilets. It was some time before another male officer also entered the toilets to assist.

Handlers noted this safety issue during our focus group discussion with them. The following comments from two handlers illustrate their concerns:

And the other thing with like operations too is people protecting us. We go into like dance parties and nightclubs . . . and you're just watching your dog so you don't know anything that's like going on and you look up and there's nobody there. Like, I've been to good operations and there they've said stick by the dog. You're job is to do that and to do that only and that keeps me safe. I can protect my dog. You look after me and we can all do a safe and happy job . . . I always tell the people who are looking after me 'Tell me if there's no more coppers and we'll get out of here.'

And some sergeants, there's one that I'm sure most of you have worked with. And he just, he'll tell them not to walk next to us because he doesn't like a big bunch of police walking together . . .¹⁵⁰

¹⁴⁹ Ombudsman observer notes, August 2003.

¹⁵⁰ Focus group of drug detection dog handlers, 28 May 2003.

Questions for consideration

- 8(c) Are adequate measures in place to ensure that drug dog handlers can safely perform their duties? How might the safety of handlers and their dogs be improved?
- 8(d) What other officer safety issues, if any, arise during drug detection dog operations?

Safety of the drug detection dogs

During our focus group discussion at the Dog Unit, handlers described a number of incidents in which their drug detection dogs were injured or threatened by members of the public. These comments from handlers illustrate the kinds of behaviour that handlers and their dogs confront:

Again I think it's later in the night when they've got a bit of drink on board, mainly in the licensed premises. And sometimes I think it's not intentionally that they've hurt the dog. I just think that they're got a bit of alcohol or whatever else on board and they like pat the dog or just be a bit smart and they'll come down and they'll actually wack the dog but they are not aware . . . I think some people do it on purpose and I think others aren't aware of just how hard . . . You know the dog will walk past - the dog's paid no attention to them, we haven't stopped to speak to them - and they'll just go smack in on their head or their bum. And one other time he copped a kick in the guts from a chick that was ripped off her head.¹⁵¹

Earlier on in the piece going into nightclubs a guy attempted to burn the dog with a cigarette – it was lucky police were really quick and kicked it out of his hand at the time. I've had somebody try to slap him across the head. I've had people, umm, try to intimidate me while I'm doing my job, and they're [saying] 'Where's your dog? Where's your dog?' And he ended up getting arrested . . .¹⁵²

Can I just say one more thing? People threaten to hit them [the dogs] as well . . . 'bring that f...ing dog near me and I'll kick its head in' and you're in two minds whether to say, 'Shut up mate I do the job how I like' or like, 'God, will he really kick the dog in the head?'¹⁵³

Our review will examine court records for charges of cruelty to animals in relation to the drug detection dogs.

¹⁵¹ Focus Group of drug detection dog handlers, May 2003.

¹⁵² Focus Group of drug detection dog handlers, May 2003.

¹⁵³ Focus Group of drug detection dog handlers, May 2003.

Chapter 9. Costs and benefits of using drug detection dogs for general drug detection

While some costs and benefits of the use of drug detection dogs in public places may be quantifiable, other possible benefits and costs are less easily measured but may be no less important.

The parliamentary debate on the Drug Dogs Act considered whether police use of drug detection dogs in general drug detection would be cost effective. One MP commented, 'The legislation is tough on police resources, it is not tough on crime.'¹⁵⁴ The Greens proposed an amendment to ensure that the drug detection dogs be used to target supply offences rather than possession offences:

*Sniffer dogs are expensive assets of the New South Wales Police Service. They require careful training from a young age by a specialised and dedicated handler . . . The Greens believe that it is grossly inappropriate to utilise these scarce and expensive assets for the purpose of charging individuals with offences of possession or control . . . It would be much better to use them in a more cost-effective way.'*¹⁵⁵

In a contrasting view, the Hon. Helen Sham-ho commented during parliamentary debate about the Bill that:

*Sniffer dogs provide a valuable resource for police officers. They provide an efficient and effective method for determining whether a police officer has reasonable grounds for believing that someone may be carrying a prohibited substance. As I said to the Minister for Police, the dogs are worth the money because of their efficiency.'*¹⁵⁶

Below we discuss some of the issues involved in assessing the cost effectiveness of using drug detection dogs in general drug detection. Many of the items discussed elsewhere in this discussion paper could also be considered to be costs or benefits of the legislation, including:

- Benefits in reducing the harms associated with illicit drug use (such as reducing the amount of drugs in the community, providing referrals to counselling and information via cannabis cautions);
- Benefits from increased use of public amenity by driving drug use or dealing out of public areas;
- Benefits from general disruption to the drug trade in public places;
- Costs associated with increasing some of the harms associated with illicit drug use (for example the possible tendency of some 'party drug' users to consume drugs in one large dose rather than stagger their use over a longer period);
- Costs to members of the community in terms of any feelings of embarrassment or invasion of privacy experienced;

¹⁵⁴ Ms Clover Moore, MP, Legislative Assembly Hansard, 6 December 2001, p. 19878.

¹⁵⁵ Ms Lee Rhiannon, MLC, Legislative Council Hansard, 13 December 2001, p. 20228.

¹⁵⁶ The Hon Helen Sham-ho, MP, Legislative Council Hansard, 13 December 2001, p. 20202.

- Perceptions among some members of the community that they are being targeted or discriminated against; and
- Costs associated with the diversion of police resources from other policing duties in order to conduct general drug detection.

This discussion is by no means comprehensive. We seek submissions on what needs to be taken into account when assessing cost effectiveness.

Question for consideration

9(a) What do you think are the costs and benefits of using drug detection dogs for general drug detection?

Removing drugs from public places

In the first year of operation, police located drugs as a result of searches following drug detection dog indications in approximately 27% of search incidents. We asked police from the Dog Unit to comment on this 'hit rate' and whether it was fair or useful to judge the success of the drug detection dogs using this kind of figure.

I don't think a percentage of success is something we can gauge the success of this project by. The amount of finds the dogs have had, the amount of charges that have been put through the courts because of these dogs I think more than justifies their use. I see them just as another tool that the police use to enforce the laws that detect people who are using illicit drugs.¹⁵⁷

. . . if the dogs weren't used, the drugs and the charges that the dogs have been responsible for, would not have been detected. I see any drugs that we get off the street, as a bonus. To have a parent go to a hospital because their kids have died of an overdose or suffering because of drug addiction – I don't think that they'd have a problem if one in 10 [of] the dogs found and took [drugs] off the street. So I see it as a positive even if we got one in 20.¹⁵⁸

Another senior police officer told us that the number of 'nil find' searches meant that it was crucial that police conducted searches 'in a very sensitive way'.¹⁵⁹

In the first 12 months of the Drug Dogs Act, police searches as a result of indications by drug detection dogs in general drug detection work have resulted in the seizure by police of 4267 grams of cannabis, 98 grams of amphetamines, 74 grams of ecstasy, 13 grams of cocaine, 2 grams of heroin, 4 grams of LSD and small amounts of a range of other substances.

Question for consideration

9(b) In the context of the nature and quantity of drugs located by drug detection dogs, is the use of the dogs in public places an effective and efficient method of policing the drug trade? Why/why not?

¹⁵⁷ Interview with senior police officer, May 2003.

¹⁵⁸ Interview with senior police officer, May 2003.

¹⁵⁹ Interview with senior police officer, August 2003.

Targeting drug supply

In the second reading of the Bill the (then) Minister for Police made clear his intention that the implementation of the Drug Dogs Act would focus on drug supply:

*Drug dealers and couriers are on notice that they will be the subject of general drug detection in authorised places prescribed under this Bill . . . If drug dealers are on licensed premises or about to enter or leave licensed premises such as night clubs, bars, entertainment venues and dance parties they could be the subject of general drug detection operations . . .*¹⁶⁰

*The Bill is aimed primarily at detecting and prosecuting persons committing offences relating to the supply of prohibited drugs or plants.*¹⁶¹

On another occasion the (then) Minister commented:

*So let us not kid ourselves: Drug addicts commit crimes and therefore they ought to be targeted. Certainly the most effective use of the scarce resource, drug detection dogs, is to target drug pushers, but drug addicts commit crimes and therefore they will also be targeted by police.*¹⁶²

Some Members of Parliament argued that the use of drug detection dogs by police would more likely focus on low-level users. One said the drug detection dogs would not target 'the Mr Bigs in the supply chain'.¹⁶³ In correspondence to this office that same MP stated:

*I have received a great deal of correspondence from constituents that questions the effectiveness of drug detection dogs in combating the drug trade. The main concern is that they target recreational users at the very bottom of the drug supply chain, and that it would be by chance, rather than by design that the dogs might detect a supplier.*¹⁶⁴

Similar concerns were expressed by another MP who argued during the debate in the Legislative Council that the legislation was, ' . . . not consistent with the Government's purported policy of targeting dealers'.¹⁶⁵

One senior police officer we interviewed felt that the main value of the use of drug detection dogs was not the targeting of supply, but the disruption to the street drug market and the deterrence effect of police visibly enforcing the drug laws.

Don't kid yourself that drug detection dogs target the upper end suppliers, commercial or high level suppliers. No. That's not what drug detection dogs do. Drug detection dogs hit medium to street level suppliers and [do they] hit them well? No. It's like a shotgun approach. You get some occasionally. But how you are affecting the drug suppliers, the street level drug suppliers, [is] that you are reducing their customers, and you are changing the behaviour of their customers. So there is an efficiency of process when you are disrupting them.

. . . By planning in these operations, what I'm trying to do is to . . . instil into people who come into [name of suburb], that there is a very high likelihood that on the night you

¹⁶⁰ The Hon. Michael Costa, MLC, Second Reading, 6 December 2003, p.19745.

¹⁶¹ The Hon. Michael Costa, MLC, Second Reading, 6 December 2003, p. 19745.

¹⁶² The Hon. Michael Costa, MLC, Legislative Council Hansard, 12 June 2002, p.2973.

¹⁶³ Ms Clover Moore, MP, Legislative Assembly Hansard, 6 December 2001, p.19880.

¹⁶⁴ Correspondence from Clover Moore, MP, Member for Bligh, 4 December 2002.

¹⁶⁵ The Hon. Peter Breen, MLC, Legislative Council Hansard, 13 December, 2001, p.20213.

*come into [name of suburb], there will be a drug detection dog there. So it's a deterrent from them wanting to purchase drugs and hence take the risk - because it's just too risky.*¹⁶⁶

Another senior police officer from another area emphasised that there had been significant supply arrests using the drug dogs:

*. . . We've got a number of good arrests with regard to supply. I'll use an analogy of fishing that I've spoken to you about before. You throw a fishing net into the water – you get big fish, you get little fish. Unfortunately, you target the big fish but the little fish get swept up in the net. But there's still the discretionary power of the police to caution those users and let them go. So, everyone doesn't have to be arrested that's found with drugs on them . . . and the intelligence that you get from some of those users leads you to supply.*¹⁶⁷

Questions for consideration

9(c) What evidence is there to support claims that the use of drug detection dogs enhances police intelligence holdings leading to supply related arrests, charges and convictions?

9(d) In what ways, if any, does the use of drug detection dogs impact on the behaviour of drug suppliers and their customers?

The data we have examined to date indicate that when drugs are found following drug detection dog indications, the quantity is usually below the amount necessary for a charge of 'deemed supply'.¹⁶⁸ Deemed supply means that although police may have no other evidence that the person found in possession of drugs was dealing or supplying drugs, the amount of drugs in the person's possession indicates that the drugs were not for personal use. The weight or quantity of drugs required for a deemed supply charge are prescribed in legislation and vary according to the drug type.

The table below shows the average weight of the four most commonly found drug types located by police over the first 12 months of the operation of the Drug Dogs Act. In some cases the average figures are a little skewed by single large finds. Median weights are also presented for comparative purposes.

¹⁶⁶ Interview with senior police officer, August 2002.

¹⁶⁷ Interview with senior police officer, May 2003.

¹⁶⁸ See s29 and Schedule 1, *Drug Misuse and Trafficking Act, 1985*.

Table 5 Main drugs found as a result of searches following drug dog indications (22 Feb 2002 to 21 Feb 2003)

Source: Dog Unit Results Spreadsheet, 22 Feb 2001 to 21 Feb 2002

* 1 amphetamines find had no weight recorded and was excluded from this table.

** 16 cannabis finds had no weight recorded and were excluded from this table.

*** 7 incidents have not been included because the weight was recorded in the form of numbers of tablets rather than grams.

**** 300g leaf or 30g of resin.

Drug Type	Total weight (grams)	Number of incidents	Median weight	Average weight	'Deemed supply' weight
Amphetamines	98.4	77*	0.86	1.9	3g
Cannabis	4267.2	924**	1.6	4.62	300g/30g****
Cocaine	12.8	12	0.89	1.07	3g
Ecstasy	73.7	65***	0.7	1.14	0.75g

In the first 12 months of the operation of the Drug Dogs Act, police located cannabis in approximately 23.5% of all searches following drug detection dog indications. Cannabis was the drug most often located by police. The average amount of cannabis found per incident was 4.62 grams, with a median amount of 1.6 grams. This means that in 50% of incidents in which police searched a person and found cannabis, 1.6 grams of cannabis, or less, was found.

If possession is the only evidence (that is, if police have no other evidence that the person was dealing drugs), the person must have at least 300 grams of cannabis leaf or 30 grams of cannabis resin to be charged with 'deemed supply'.¹⁶⁹ In the first 12 months of the operation of the Drug Dogs Act, the largest single cannabis find by police using a drug detection dog was 240 grams. Police described the cannabis as 'head/leaf'.¹⁷⁰ The defendant, a 44 year old man who had no prior criminal record, was charged with possession of a prohibited drug and pleaded guilty. He was fined \$100.¹⁷¹

In another incident, a drug detection dog indicated a man standing on a railway station in Northern NSW. After being informed of the indication, the man handed to police a small amount of cannabis head he had kept in his cigarette packet. Police later searched the man's luggage and located 137.73 grams of 'Cannabis Resin (Hashish)'.¹⁷² According to the police event narrative:

... [The man] informed police that he paid \$25.00 for the Cannabis Heads, however the five blocks of Cannabis Resin (Hashish) were given to him by a friend at no cost. [Name] further informs Police that he has been a social user of Cannabis since he was thirteen years of age, and would smoke five 'cones' of cannabis a week. [Name] has been co-operative with Police at all times, he was then charged with possession of the Cannabis and the drug utensil (brass coloured pipe).

¹⁶⁹ See s29 and Schedule 1, *Drug Misuse and Trafficking Act, 1985 (NSW)*; The Dog Unit spreadsheet does not note any instances of cannabis resin being located by police. However, we located one incident in which 137.73 grams of cannabis resin was located. This incident was recorded as 'cannabis' in the spreadsheet. There may be other incidents of this nature of which we are currently unaware.

¹⁷⁰ Event record 3.

¹⁷¹ *Police v Kevin Brockenshire*, Coffs Harbour Local Court, 4 November 2002.

¹⁷² Event record 4.

The estimated amount of both types of Cannabis seized is estimated to be in the vicinity of six thousand and five hundred dollars (\$6,500.00).¹⁷³

It seems that the man was only charged with a possession offence. Police have informed us that once analysed the substance weighing 137.73 grams proved not to be cannabis 'resin'.¹⁷⁴

Although a large amount of cannabis leaf is required to meet the deemed supply provisions of the Drug Misuse and Trafficking Act, smaller amounts of other drugs are required. For example, possession of 3 grams of amphetamine, cocaine, or heroin, and 0.75 grams of ecstasy would allow police to charge a person with deemed supply. The median amounts of cocaine, ecstasy, and amphetamines found by police were all below the amounts required to charge a person with deemed supply. On nine occasions police located an amount of amphetamines in excess of the amount required for a charge of deemed supply, and on 32 occasions more than the deemed supply amount of ecstasy was located. Although police may locate an amount which allows them to charge a person with deemed supply our research indicates that few of these persons were convicted of supply offences in court. This is because:

- Police may choose to take action only in relation to a 'possession' offence;
- Police may withdraw an original charge of deemed supply before it proceeds to court; or
- The person may have been found 'not guilty' or otherwise not convicted of the offence.

Question for consideration

9(e) In what ways does use of drug detection dogs affect the drug trade, particularly the supply of illicit substances, in NSW?

Reducing fear of crime in the community

Some measures of cost/benefit for the use of drug detection dogs in general drug detection work are not easily quantified. It has been consistently argued by senior police that high visibility police operations, many of which utilise a drug detection dog, reduce the fear of crime in the community.

High visibility policing (HVP), sometimes known as saturation policing, is a term used to describe high profile police operations in which uniformed police conduct highly visible patrols in public places. The number of police employed in operations varies from around 10 to more than 600. Operation Vikings is perhaps the best known HVP operation in NSW. According to one commander:

The focus of [Vikings] is high visibility, high impact. It is designed to address anti-social behaviour and reduce fear of crime in the community.¹⁷⁵

¹⁷³ Event record 4.

¹⁷⁴ Telephone conversation with police informant, 28 April 2004.

¹⁷⁵ Superintendent Graeme O'Neil, quoted in, L Kennedy, 'Police beat their own drum in street sweep', *Sydney Morning Herald*, 25 May 2002.

On the other hand, Grabosky comments:

*The conventional response to the problem of fear of crime is to increase the presence of police. Aside from being very costly, this approach may overlook the fact that fear of crime is not distributed evenly across people and places. Furthermore, the mere presence of additional police is by no means certain to reduce crime or fear although it may increase public confidence in the police.*¹⁷⁶

Increased police presence as part of overt street operations can reduce levels of fear, increase community use of public amenities and instil greater confidence in the safety of public places.¹⁷⁷ Senior police and former Police Minister, Mr Costa, have publicly asserted that high visibility policing plays a role in reducing the fear of crime in the community.¹⁷⁸ Senior Dog Unit officers have also expressed the view that participation in high visibility operations by drug detection dogs and handlers contributes to reduced fear of crime in the community.¹⁷⁹

A recent study¹⁸⁰ commissioned by the H.M. Inspectorate of Constabulary in Scotland goes some way to reinforcing this view. The study found that police and police visibility were 'frequently the first factors mentioned as important' in terms of public reassurance, and 89% of people interviewed stated that they thought a visible police presence would make people feel safer.¹⁸¹ The study also found that for young people, greater police visibility was not important and a concern was expressed that greater police visibility 'may lead to more harassment for young people.'¹⁸² Positive interactions with police were found to be more important to young people than police visibility in general.

It should be noted that the respondents to the Scottish study also emphasised the *nature* of interactions with police as being highly relevant. The nature of interactions with small numbers of police on foot patrols may differ significantly to the interactions which take place when large numbers of police patrol an area on mass. For example, a recent HVP operation in Dubbo was reported in the media as follows:

*A recent HVP operation in Dubbo reportedly evoked condemnations from many in that community, with one Sydney newspaper reporting that Dubbo residents felt 'pillaged' after the operation and that police were 'left reeling from the negative response'.*¹⁸³

*One local council member put a motion objecting to the police use of heavy-handed tactics during the operation.*¹⁸⁴

As part of our review of the implementation of the Drug Dogs Act we have surveyed members of the public at a range of locations during drug detection dog operations.

¹⁷⁶ P. Grabosky, 'Fear of Crime and Fear Reduction Strategies' (1995), 44 Australian Institute of Criminology; *Trends and Issues in Crime and Criminal Justice*, p.4.

¹⁷⁷ A. Graycar, D. Nelson & M. Palmer, 'Law Enforcement and Illicit Drug Control' (1999) 110, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, p.3.

¹⁷⁸ See for example, S. Maher, 'Spectacular failure: 600 police – 25 Drug Arrests', *Sydney Star Observer*, 26 September, 2002; and L Kennedy, 'Police beat their own drum in street sweep', *Sydney Morning Herald*, 25 May 2002.

¹⁷⁹ Interviews with senior officers from the NSW Police Dog Unit, May 2003.

¹⁸⁰ Market Research UK, *Narrowing The Gap, Police visibility and public reassurance – Managing public expectation and demand*, Edinburgh, February - April, 2002.

¹⁸¹ *Ibid.*, p.16.

¹⁸² *Ibid.*, p.12.

¹⁸³ S. Sofios, 'Viking raid leaves people of Dubbo feeling pillaged', *The Daily Telegraph*, 8 February 2003.

¹⁸⁴ Editorial, 'Proposal to condemn police operation fails', *Daily Liberal*, 26 February 2003.

We have asked questions to help us assess whether the conduct of high visibility policing does assist in reducing the fear of crime in the community. We will report on these findings in our final report on the implementation of the Drug Dogs Act.

Question for consideration

9(f) In what ways, if any, do high visibility police operations using drug detection dogs influence the fear of crime in the community?

Impact of drug detection dog operations on local businesses

Before the Drug Dogs Act, police used drug detection dogs in operations targeting licensed premises in relation to supplying drugs and attempted to close premises where large amounts of drugs were found by the drug detection dogs.¹⁸⁵ The Commander of Kings Cross Local Area Command, was reported as saying:

*If you allow drug dealing to take place in your premises, watch out – we're there . . . the heat is on.*¹⁸⁶

Drug detection dogs have continued to be deployed in licensed premises since the introduction of the Drug Dogs Act. We have interviewed a number of managers and licensees of licensed premises at which drug detection dogs have been used. Managers and licensees expressed a range of views about police patrolling their premises with drug detection dogs.

Some felt that these police operations had a negative impact on their business. For example, one licensee commented that the police drug detection dog operations 'absolutely has crippled us'. He reported a 50% downturn in takings and said that some people wouldn't continue to come to the area, not because they were carrying drugs but because they had been searched by police and didn't want the 'hassle'.¹⁸⁷

Another manager said:

*Patrons say why are you being raided? I explain the best I can. Some go away and never come back again.*¹⁸⁸

Others see the police patrols as largely positive:

*The good thing is that it makes sure the pub is clean. Especially now these days with the date rape and all that sort of stuff. All the drugs around, bad drugs around. Probably keeps the dealers out. I'd like to think that I run a very tidy establishment. I don't want them in here anyway. The advantage is that they keep the drug dealers out.*¹⁸⁹

Other comments were more neutral:

¹⁸⁵ T. Maguire and K. Pollard, 'Police to apply for closure of drug-raid clubs', *Daily Telegraph*, 22 October 2001.

¹⁸⁶ Commander Inspector Dave Darcy in K Lawrence, 'What a night as 35 police raid city club', *Daily Telegraph*, 18 June 2001

¹⁸⁷ Interview with licensee, October 2002, inner metropolitan Sydney.

¹⁸⁸ Interview with manager, November 2002, inner metropolitan Sydney.

¹⁸⁹ Interview with licensee, 20 November 2002, Western Sydney area.

*No, I don't think it's affected adversely or positively in any way. They're in and out in a couple of minutes. They don't hang around.*¹⁹⁰

Police run drug detection dog operations in a range of locations potentially impacting on a range of business types. For example police attend dance parties, walk through public shopping malls and other retail areas, as well as patrolling railway stations and local markets. We are interested in the views of owners and managers of a range of businesses about any impact of the use of drug detection dogs on their business.

Question for consideration

9(g) What are the benefits and/or disadvantages for businesses, of the use of drug detection dogs?

Actual costs for police

As concerns about the costs of training and using the drug detection dogs in general drug detection was raised as an issue in the parliamentary debates on the Drug Dogs Act, we hope to report on police costs in our final report about the implementation of the Act.

Such costs might include:

- Purchasing, training, maintaining (food and veterinary costs etc) and housing drug detection dogs;
- Travel allowance, salary costs, uniforms, and training costs for drug dog handlers;
- Costs associated with the prosecution of matters in court;
- Administrative costs of running the Dog Unit; and
- Costs associated with police from local commands or other units (such as Vikings) conducting drug detection dog operations.

It is likely that an exact figure establishing a 'per unit' or overall cost of general drug detection under the Drug Dogs Act will not be calculable. However, we hope to be able to provide at least some actual cost estimates in relation to the use of the drug detection dogs in these public operations.

Police resources used in the public interest

In assessing the costs and benefits of the implementation by police of the Drug Dogs Act, the overarching question is whether the use of drug detection dogs for general drug detection represents an efficient use of police resources for drug law enforcement.

As noted above in this chapter and elsewhere in this paper, the Drug Dogs Act was introduced with a primary goal of targeting drug supply related offences. The data we

¹⁹⁰ Interview with licensee, 20 November 2002, Western Sydney area

have received and examined to date shows that where drugs have been located, the drug detection dogs have targeted the possession of small quantities of drugs, predominantly cannabis. It may be that the use of drug detection dogs produces significant public benefits beyond those associated with an increased issue of cannabis cautions, such as reduced fear of crime in the community and allowing police to effectively combat higher level drug dealing by gathering intelligence. Information evidencing these benefits would assist this review in assessing the significant policing efforts with the drug detection dogs against the outcomes of this police work. We have asked questions earlier in this chapter to elicit such information from police and any other organisations or individuals who may be able to provide it.

However, it may be that even the best efforts of police acting in accordance with the Drug Dogs Act may not lead to significant results in terms of policing drug supply. Information and examples canvassing this broad issue would be of assistance.

Question for consideration

9(h) Does the *Police Powers (Drug Detection Dogs) Act* provide an effective and appropriate legislative framework for police to use drug detection dogs to target drug supply?

Chapter 10. Legal interpretation issues

The following discussion looks into some questions of legal interpretation that have come to our attention during the review period.

Some aspects of the Drug Dogs Act appear to be open to interpretation. This may present difficulties for police attempting to implement the new laws in way that meets both the objectives of the legislation and the letter of the law. It is our view that there should be little scope for ambiguity with respect to interpretation of the Drug Dogs Act.

It may be appropriate for Parliament to consider the amendment of the legislation where lack of clarity has the potential to impact on the ability of police to properly and consistently apply the law.

Persons seeking to enter or leave premises

Section 7 (1) of the Drug Dogs Act sets out the conditions according to which police may use a drug detection dog for general drug detection, without a warrant, in relation to specified 'persons.' The section describes these persons as persons at or on, 'or seeking to enter or leave' specified premises, activities or events:

7(1) A police officer may, without a warrant, use a dog to carry out general drug detection in relation to the following persons:

persons at, or seeking to enter or leave, any part of premises being used for the consumption of liquor that is sold at the premises (other than any part of premises being used primarily as a restaurant or other dining place),

persons at, or seeking to enter or leave, a public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held,

persons on, or seeking to enter or leave, a public passenger vehicle that is travelling on a route prescribed by the regulations, or a station, platform or stopping place on any such route.

This section suggests that police would be entitled to use a drug detection dog to conduct general drug detection without a warrant, in relation to a person 'seeking to enter', for example, a dance party. To use a drug detection dog in relation to a person seeking to enter a dance party, it might be expected that police would use the drug detection dog *outside* the entrance to the party, for example along a queue of people attempting to gain admission.

The Drug Dogs Act also provides:

8 (1) A police officer may use a dog to carry out general drug detection if authorised to do so by a warrant under this section.

The relationship between section 7 and section 8 of the Drug Dogs Act has been the cause of some confusion in regard to the practical application of the Drug Dogs Act. In December 2001, the Ministry for Police wrote to the Crown Solicitor seeking advice in relation to the interpretation of these sections, concerned that 'there could be two

possible interpretations of clause 7'.¹⁹¹ The nub of the interpretation problem was expressed in that letter, as follows:

I am advised that it is customary for police drug detection dog operations on premises such as nightclubs to place a dog immediately outside the entrance/exit to the premises as well as within the premises.

...it would seem possible to argue that clause 7 specifically contemplates permitting detections without warrant of 'persons' who are entering or leaving the prescribed premises. Therefore, it would seem possible to argue that as long as the drug detection dog is used to detect illegal drugs on a person who falls within clause 7, and reasonably close to the entrance of the relevant premises (whether a public place or not), a warrant is not required.

However, it would also seem possible to argue that when clause 7 is read in conjunction with clause 8 it could be argued that police must obtain a warrant in order to continue operation practice of intercepting persons entering and leaving clause 7 premises when the dog stands outside those premises (i.e. on the footpath).¹⁹²

The advice from the Crown Solicitor confirmed that, on the face of it, there was more than one possible interpretation of this aspect of the Drug Dogs Act. Seeking clarification, the Crown Solicitor had recourse to both the Explanatory Note to the Bill and the Second Reading speech for the Bill. Consideration of these materials led the Crown Solicitor to conclude:

If police propose to use a dog in a public place outside the entrance to a public place specified in cl.7 to carry out general drug detection in relation to persons in the former public place who seek to enter or have left the latter public place, it seems that Police will have to obtain a warrant pursuant to cl.8.¹⁹³

The Crown Solicitor's advice has directly influenced police practice. The 'Drug Detection Dogs Management Operational Guidelines' quotes the above extract from the Crown Solicitor's advice¹⁹⁴ and adds:

In light of that advice, if people who are seeking to enter a public place or have left a public place as specified in section 7 of the Act, and are then in a public place as otherwise defined, a drug detection dog cannot be used to conduct a general drug detection without a warrant.¹⁹⁵

In practice this has meant that unless police have obtained a warrant they will not screen persons who are, for example, queuing on the footpath to enter a nightclub or bar. Similarly, without a warrant, police will only use the drug detection dogs behind the barriers at railway stations, where a ticket is required. Handlers have been advised not to use the dogs to screen people seeking to enter either of these areas unless police have obtained a warrant.

¹⁹¹ Correspondence from Mr Les Tree, Director General, Ministry for Police, to Mr I. Knight, Crown Solicitor, 12 December 2001.

¹⁹² Correspondence from Mr Les Tree, Director General, Ministry for Police, to Mr I. Knight, Crown Solicitor, 12 December 2001

¹⁹³ I. .V Knight, Crown Solicitor, Advice re: Clauses 7 and 8 of the *Police Powers (Drug Detection Dogs) Bill 2001*, 19 December 2001.

¹⁹⁴ NSW Police, *Drug Detection Dogs Management Operational Guidelines*, p 9.

¹⁹⁵ *Ibid.*, p 9.

Police have also raised with us the difficulty of knowing whether a person in or near a queue to a nightclub is actually seeking to enter the club. A person who appears to be in the queue seeking to enter may, for example, be chatting with a friend in the queue and have no intention to enter the premises.

There may be advantages for police in screening persons as they queue to enter places. For example, in some cases screening a queue outside a venue might allow police to screen patrons of a crowded, noisy venue without taking the drug detection dog inside. On the other hand, some business proprietors may be concerned about the impact on business of a large and/or prolonged police presence outside their venue. The physical layout of some railway stations may also make it more convenient for police, rail staff and commuters if screening were conducted in the less constricted areas outside the ticket barriers rather than in crowded areas beyond the ticket gates.

While this screening can currently be conducted with a warrant, the question arises whether the increased time for police and magistrates involved in obtaining a warrant is justified in the light of Parliament's intention and the slight (if any) additional impact on members of the public that such a change in location would involve.

Questions for consideration

10(a) Is legislative amendment required (and if so what kind of amendment) to allow police, without a warrant, to use drug detection dogs in relation to persons seeking to enter licensed premises (or other premises or passenger vehicles specified in section 7), if those persons are in or on a public place (e.g. the footpath) outside those premises?

10(b) What are the benefits/disadvantages of using drug detection dogs to screen entry to premises and public passenger vehicles?

The use of drug detection dogs in relation to person, property and premises

Section 4(2) of the Drug Dogs Act appears to be aimed at permitting the use of drug detection dogs in circumstances where an officer is permitted to be on premises to exercise functions. An example of this may be where an officer is executing a search warrant.

Section 5 of the Drug Dogs Act, which defines general drug detection for the purposes of the Act, does not distinguish between detection of prohibited drugs or plants in the possession or control of a person in public places and other places. However, the remainder of Part 2 of the Act confines the use of drug detection dogs for general drug detection to licensed premises, and certain public places and public transport.

A possible consequence of this is that, in a private place where police are otherwise entitled to be (for example, premises covered by a search warrant), and where police are not otherwise entitled to search a person, police may not be permitted to use a drug detection dog for general drug detection – that is detection of prohibited drugs or plants in the possession or control of a person – because the premises are not licensed premises or identified public places or public transport. It is unclear whether this was an intended consequence of the Drug Dogs Act.

Questions for consideration

10(c) Does the Drug Dogs Act in its present form provide sufficient clarity in relation to the use of drug detection dogs for general drug detection on private premises?

Screening property

Another question arises in relation to the screening of property, as opposed to persons: When is an item of personal property sufficiently connected to a person to fit within the requirements of general drug detection under Part 2 of the Drug Dogs Act? Or, alternatively, does the detection of prohibited drugs *not* in the control or possession of a person fall outside of Part 2 of the Drug Dogs Act. The application of the legislation in relation to unaccompanied items or premises (rather than persons) appears less than clear. Questions of policy, for example anti-corruption issues, also arise in relation to the screening and searching of unaccompanied items.

Section 7 of the Drug Dogs Act provides that general drug detection without a warrant may only be conducted in relation to 'persons'. According to the Dog Unit's Management Operational Guidelines, the definition of persons would include items in the immediate possession or control of the person, such as a handbag.¹⁹⁶

The use of drug detection dogs to screen property or premises has come to our attention in a number of contexts. The most common example we have observed of the use of drug detection dogs in relation to premises, occurs when the dogs locate prohibited substances in garbage bins or on the floor in licensed premises or other locations in which Part 2 authorises police to use the dogs in relation to 'persons'.

Some local area commands also use drug detection dogs to screen unaccompanied luggage on trains or luggage being unloaded from domestic flights by luggage handling staff. We observed one operation in which police used a drug detection dog and a firearms and explosives detection dog¹⁹⁷ to screen luggage in the luggage compartment of an interstate train. This is described in the case study below.¹⁹⁸

¹⁹⁶ The *New South Wales Police Drug Detection Dogs Management Operation Guidelines*, (at page 10) state that if property is in the control or possession of any person within the provisions of the Drug Dogs Act then general drug detection person screening procedures should apply.

¹⁹⁷ Firearms and explosives detection dogs may be used in relation to a public place and 'general firearms and explosives detection' is not limited to the screening of 'persons'. See *Firearms Act 1996 (NSW)*, s72 D(1).

¹⁹⁸ We suggested to local police that legal advice be sought prior to deploying the dogs. Police sought internal advice from the NSW Police Legal Services branch. We understand that local police were advised that a legal basis for the use of the drug detection dogs in this manner could be found in s5 of the Drug Dogs Act. This section defines general drug detection as including the detection of prohibited drugs in the 'possession or control' of a person. Police told us that a representative of the NSW Police Legal Services had advised that because the luggage was in the control of the train guard, it was in the control of a 'person' as required by s5 of the Drug Dogs Act, and police were therefore entitled to use the drug detection dogs to screen this luggage.

Case Study: Use of a drug detection dog in the luggage compartment of a train.

The aim of this operation was to detect illegal drugs and firearms being transported by train from other Australian states to NSW.¹⁹⁹ Two Ombudsman observers accompanied police.

Four police (including a drug detection dog handler and a firearms and explosives detection dog handler) boarded the luggage carriage of the train at an 'unscheduled stop' arranged for this purpose. The Officer in Charge (OIC) of the operation asked permission from the train guard to enter the luggage compartment. The guard gave his permission. This was video-recorded by police.

A number of bags were indicated by the dogs. Each indication was videoed by police.

Although the Operational Orders for this operation stated that 'any bags indicated by the dog may be opened and examined' and that the examination of bags should be videoed, police did not examine the bags until the bags had been claimed by their owners.

On this occasion no drugs or firearms were located in the luggage. One pair of 'searching police' believed that the odour from a small container in one item of luggage provided evidence that it had previously contained some form of cannabis. The owner of the luggage denied this. No further action was taken by police.

We found another example of police using a drug detection dog in relation to property in one COPS event we examined. In this event police allowed the drug detection dog to screen an unaccompanied 'bike'. The event narrative states:

LOCATION: [name of hotel, street, city]

About 5.50pm on [date] whilst performing a drug dog operation in the [name of locality] CBD dog [identification of dog] detected a scent on a bike located at the above property.

The bike had a back pack attached to it with a lock.

Police searched the bag nil item located.

Small particles of cannabis was located inside the bag.²⁰⁰

We are yet to conduct a systematic review of drug detection dog events recorded in the police COPS system. Consequently, we are currently unable to determine whether this type of incident is a common occurrence. During our direct observation of police operations, we have noted some instances in which the drug detection dog has indicated an unaccompanied item, for example a jacket left on a chair, and police have refrained from searching the item until its owner could be located.

¹⁹⁹ Operational Orders, Drug and Firearm Detection Operation, 2003.

²⁰⁰ Event record 5.

Questions for consideration

- 10(d) Under what circumstances can or should police screen and search items not accompanied by their owners?
- 10(e) In what circumstances can police use drug detection dogs to screen premises, vehicles or things as opposed to 'persons'?

Consent

During one operation using a drug detection dog, we accompanied police into a retail outlet. The drug detection dog screened the premises, showing particular interest in a back room of the shop. Police had obtained a warrant on this occasion which specified that police could:

...use a dog to carry out general drug detection in [name of locality] CBD and environs bounded by [specified streets and landmarks] including streets, laneways and public places ...[on] Thursday [date] between 9am and 3pm.²⁰¹

It was unclear if police obtained consent to enter the premises, which were, in any event, open to the public. The drug detection dog did not locate any prohibited substances in the shop.

Another question arises as to whether general drug detection outside the provisions of Part 2 of the Drug Dog Act is legally conducted if it is performed with the consent of the relevant person.

On one occasion, we observed police use a drug detection dog to search a car. The car belonged to a man who had just been indicated by the dog and who was searched with no result. Police informed us that the man had given his consent for his vehicle to be searched. No prohibited drugs were located in the car. There may be a question as to whether a vehicle in a public place constitutes a 'public place' under the Drug Dog Act.

It has previously been held that possession of a firearm in a vehicle on a public road does not constitute possession in a 'public place' for the purposes of s 93G(1)(a)(i) of the *Crimes Act 1900*.²⁰² However, in that judgement the NSW Court of Appeal also held that, '...the question whether an act was relevantly committed "in a public place" must ultimately turn on the terms of the particular legislation under consideration.'²⁰³

It is unclear whether this search formed part of the general drug detection authorised under the warrant that police had obtained, or was authorised according to some other legislative provision, or by consent.

²⁰¹ Form 2 Warrant, 2003.

²⁰² *Hardman v DPP* (NSW) [2003] NSWCA 130.

²⁰³ *Hardman v DPP* (NSW) [2003] NSWCA 130, per McColl JA.

Question for consideration

10(f) According to the current legislative provisions can police conduct general drug detection outside the terms of Part 2 of the Drug Dogs Act if they do so by consent? What are the advantages/disadvantages of this type of policing?

Reasonable suspicion to search created by 'avoidance' of drug detection dog

Section 10 of the Drug Dogs Act provides that:

Nothing in this Act confers on a police officer a power:

. . .

to detain a person who the officer is not otherwise authorised to detain.²⁰⁴

At a number of police briefings we have attended, senior officers have advised police that they should not rely solely on the drug detection dog during the operation: that they should use their discretion and any other police powers which may be appropriate. The kind of instructions police receive about forming a reasonable suspicion²⁰⁵ without a drug dog indication, include the following:

If you form reasonable suspicion because of someone's reaction to the dog, that's up to you.²⁰⁶

Don't hold a person who looks suspicious for the dog. If you have reasonable cause to search, then do so. But do not bring the person to the dog.²⁰⁷

Advised that if they see people leaving the plaza when the dog gets there to "turn them over" because they have reasonable cause.²⁰⁸

If a person sees the dog and 'bolts' this may give you reasonable suspicion under the Drug Misuse and Trafficking Act.²⁰⁹

There is no doubt that the Drug Misuse and Trafficking Act confers on police a power to search a person without a prior indication by a drug detection dog:

s37(4) A member of the police force may 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, . . .

Although police cannot 'detain' someone to allow the drug detection dog to screen the person, the practical application of this safeguard operates somewhat ambiguously. For example, a person who attempts to leave an area before the dog is able to screen them is likely to be stopped and spoken to by police. This delay in the person leaving

²⁰⁴ *Police Powers (Drug Detection Dogs) Act*, s10.

²⁰⁵ For an explanation of 'reasonable suspicion' see Chapter 2 'Background'.

²⁰⁶ Ombudsman observer notes, August 2003.

²⁰⁷ Ombudsman observer notes, July 2003.

²⁰⁸ Ombudsman observer notes, April 2003.

²⁰⁹ Ombudsman observer notes, November 2003.

may allow the drug detection dog time to screen the person. Alternatively, the police may search the person on the basis that the person's attempt to avoid the dog gave police reasonable suspicion sufficient to search the person.

Many police we have observed or spoken with during the course of our review consider that a person's reaction to a drug detection dog might provide them with the reasonable suspicion necessary to search a person according to the *Drug Misuse and Trafficking Act 1985 (NSW)*.

In some circumstances, the person's behaviour might provide a relatively clear indication that they are attempting to avoid the drug detection dog. The following extract from an event narrative provides a useful example:

About 4.15pm whilst patrolling [name of mall, suburb] an area which is very well known for the purchase and supply of illicit drugs, in company with Drug detection Dog [name of dog] and uniformed dog handler, police observed a male person sitting on a brick retaining wall.

The male person looked directly towards police and Drug Dog and immediately stood up and ran in the opposite direction of police towards [name of street] where he attempted to stop a taxi.

Plain clothes police have yelled for the taxi and male person to stop. The male person jumped in the taxi and yelled, "Go, go, go!" Police had both their official identification badges out and called for the taxi to stop. The taxi came to a halt and the male person exited from the passenger side door where he was escorted to the footpath by police.

Police asked why the defendant has run from them and if he was carrying any drugs. The defendant, [name of person] has replied, "Yeah I've got this." The defendant has removed a piece of paper containing an orange coloured pill. Police asked what the pill was and the defendant replied "Its Normasen".

The defendant was cautioned and Constable [name] has asked the defendant what was in the backpack on his shoulder. The defendant refused to answer and has immediately ran west along [name of street] towards [name of street].

Constable [name] and [name] pursued the defendant constantly yelling "Stop Police, Stop Police". The defendant ignored police and continued to run. About twenty metres from [name of street] constable [name] has tackled the defendant and both [constable name] and the defendant have slammed into a telegraph pole.²¹⁰

The defendant's bag was then searched and 41 grams of 'speed'²¹¹ was found. The defendant was subsequently charged with supplying a prohibited drug.

However, on other occasions, the basis for the police response to a person may be less clear. For example, our observer noted the following incident during a police operation in Western Sydney:

Police run after a boy (approx. 12 years) who appears to run away from them. According to the handler there was no drug indication on the boy. Police ask the boy why he ran

²¹⁰ Event record 6.

²¹¹ A colloquial term for amphetamine based drugs.

*away and he says he thought his bus was there. He is with some older boys who have a bag with some alcohol in it.*²¹²

The boy was not searched by police.

During an observation at another location in Sydney's inner west a man was searched because of his reaction to the drug detection dog. Our observer's notes record:

The dog is screening the top of the stairs [at a railway station]. The dog seemed to be going towards a person but did not make an indication. The man's reaction led the police to talk to him and 'get his details'. The man commented that he didn't like dogs.

This man didn't really seem to be doing anything. The reasonable suspicion [that the police action appeared to be based on] was his reaction to police but this was fairly minimal. He just kept walking fairly rapidly.

During the same observational session a man was observed to get up from his poker machine just before the drug detection dog was led past him. As he walked away a police officer stopped him and spoke to him. The drug detection dog continued down the line of poker machines and was then led past the man speaking to the police.

The notion that a person's avoidance of a drug detection dog could provide police with the suspicion necessary to search a person is also complicated by the fact that some people appear to be genuinely afraid of the dog. Their avoidance may be because of this fear. Police acting on avoidance type behaviour use their discretion to determine whether a person's behaviour is suspicious. However, it may be difficult for police to distinguish a fear of being searched (and found with drugs) from a genuine fear of the drug detection dog.

Question for consideration

10(g) In what circumstances might it be reasonable to base a decision to search a person on that person's reaction to a drug detection dog?

²¹² Ombudsman observer notes, December 2002.

Chapter 11. Use of drug detection dogs on trains and at railway stations

The Drug Dogs Act confers a power on police to use drug detection dogs for general drug detection without a warrant, on railway stations and platforms and on trains and buses along specified routes. Section 7 of the Act provides:

7(1) A police officer may, without a warrant, use a dog to carry out general drug detection in relation to the following persons:

...

...

persons on, or seeking to enter or leave, a public passenger vehicle that is travelling on a route prescribed by the regulations, or a station, platform or stopping place on any such route.

(2) In this section, public passenger vehicle means a train, light rail vehicle or bus that is used to provide a public passenger service.

On 10 May 2002, the Drug Dog Regulation commenced. The Drug Dog Regulation set out the prescribed routes for the purpose of section 7 (1) of the Act. In summary, the train routes include the:

- Bankstown route via Bankstown station (between Liverpool and Central);
- Inner West route via Regents Park station (between Liverpool and Central);
- Eastern Suburbs route (between Bondi Junction and Central);
- Illawarra route (between Bomaderry and Central, but not between Lysaghts station and Port Kembla station);
- Northern route via Strathfield station (between Newcastle and Central);
- South route via Granville station and Circular Quay (between Campbelltown and Central);
- Western route via Strathfield, including the Olympic Park loop (between Penrith and Central); and
- North Shore route (between Berowra station and Sydney Central station and via Chatswood station). *The inclusion of this route is the result of a recent amendment. See below.

The Drug Dogs Regulation has recently²¹³ been amended by the Police Powers (Drug Detection Dogs) Amendment (North Shore Line) Regulation 2004. This amendment includes 'the North Shore line as a prescribed train route on which a police officer may, without warrant, use a dog to carry out general drug detection.'²¹⁴

NSW MP, Barry O'Farrell, the state member for Ku-ring-gai also reportedly expressed concern that the drug detection dogs were 'unable to work on the North Shore Line' even though '...this line has been ranked by the public in a State Rail Survey as the

²¹³ *New South Wales Government Gazette*, No. 77, 30 April 2004.

²¹⁴ Explanatory note, *Police Powers (Drug Detection Dogs) Amendment (North Shore Line) Regulation 2004*.

fifth worst of 15 rail lines for security and safety on the State Rail network.²¹⁵ The recent amendment would seem to have addressed this concern.

The list above shows that police are able to deploy drug detection dogs without warrant on trains on most CityRail lines. To deploy dogs for general drug detection on the East Hills line between Turella and Holsworthy and the Illawarra route between Lysaghts and Port Kembla station, police required a warrant.

The Drug Dogs Regulation also prescribes the following bus routes:

- the Albury route via Goulburn and the Hume Highway (between Albury and Sydney)
- the Grafton route via Kempsey and the Pacific Highway (between Grafton and Sydney).

During the first year of the Act, police did not conduct general drug detection on buses.

Choice of prescribed rail lines and bus routes

During the second reading speech for the Drug Dog Act the (then) Minister for Police stated:

General drug detection will also operate on transport lines, as prescribed in the regulation-making power under the bill. This is a vital tool for police to follow the drug trade as it moves around. If need be, the lines prescribed will change as the circumstances change. As Minister for Police, I will monitor the effectiveness of the localities prescribed by regulation, and the Attorney General, on the basis of police intelligence, will be in a position to draft the regulations as to what transport locations need to be designated.²¹⁶

NSW Police originally requested that all City/State Rail, STA and interstate bus networks be prescribed routes under the Drug Dogs Regulation. Under this proposal NSW Police would be able to deploy drug detection dogs on any of these routes without first obtaining a warrant.

NSW Police was concerned that:

. . . by prescribing certain train routes, members of the public who use public transport to transport or distribute illegal drugs will merely change their route to avoid those prescribed in the Regulation.²¹⁷

The final draft of the Drug Dog Regulation prescribed an extensive list of rail routes but fell short of coverage of the entire rail system. It seems that the prescribed rail lines were selected on the basis of information about drug 'detections'²¹⁸ identified on SRA property in 2001.

²¹⁵ Barry O'Farrell, MP quoted in, Shore's rail is a danger, *North Shore Times*, 14 February 2003, p 6.

²¹⁶ The Hon. Michael Costa, Legislative Council Hansard, 6 December 2001, p.19745.

²¹⁷ Memorandum from (then) Commander State Protection Group to Ministry of Police, 6 March 2002.

²¹⁸ Documentation in relation to the selection of rail lines has been difficult to locate. We have located some documents referred to in the negotiations that occurred about the choice of rail lines. However it has been difficult to source many of these documents. One document, entitled 'Count of Drug Detection on SRA property by Suburb in 2001' appears to have

The bus routes were nominated by NSW Police on the basis of 'major drug detections in the recent past'.²¹⁹ We have been unable to locate more specific detail about these drug detections for this discussion paper.

A number of police we have spoken to maintain that police with drug detection dogs should be able to access the entire rail network without warrant. For example, one senior officer commented:

I can't see why there was a distinction between the different rail lines. I'll give you an example, in the Wollongong area, the line between Port Kembla and Wollongong is not a designated route, yet [suburb 'A'] in the Wollongong area is one of the major drug distribution areas. So why the distinction was made not to put Port Kembla as one of the designated routes or delete it from the designated route is something that I can't follow. If drugs are being distributed on the rail network . . . I can't see why it wouldn't have been a blanket within the rail network.²²⁰

Questions for consideration

- 11(a) What difficulties and/or advantages are presented for police using drug detection dogs, and the community, by the selection of railway lines in the Drug Dogs Regulation?
- 11(b) Are the rail routes selected for use of the drug detection dogs without a warrant the most appropriate lines?
- 11(c) Are police monitoring the effectiveness of the localities prescribed (and those not prescribed) by the regulation to ensure appropriate public transport routes are targeted? If yes, what methods are employed and how often are the prescribed routes reviewed?
- 11(d) What advantages or disadvantages might apply to extending use of drug detection dogs (without police obtaining a warrant) to the entire CityRail network?

How do police work with a drug detection dog on railway stations and trains?

We noted in Chapter 4 'Summary Information' that drug detection dog indications most commonly occurred at a railway station or train, accounting for slightly more than 61% of all indications. We have directly observed police operations deploying drug detection dogs on trains and railway stations on more than 12 occasions since the Drug Dogs Act commenced.

Typically police patrol the ticketing and barrier area of the station as well as the platforms. A common strategy involves the handler placing the drug detection dog either at the top or bottom of stairs that lead from the platform or near the station exit to screen passengers after they have alighted from the train or as they leave/enter the station. Sometimes this has involved crowds of people moving through a smallish area creating a funnel type effect. Generally the drug detection dog is kept to the side of the commuters. During operations at railway stations police often have a separate

been the basis of some decisions about the choice of rail lines, however, it is unclear which agency produced the document and the nature of the drug detections to which it refers.

²¹⁹ Memorandum from (then) Commander State Protection Group to Ministry of Police, 6 March 2002.

²²⁰ Interview with senior police officer, 9 May 2003.

room available to conduct searches. However, we have also frequently observed police search people on platforms and in other public areas.

We have also observed police using a drug detection dog on trains. We have noted that police appear to avoid patrolling very crowded trains with the dog. Sometimes police will patrol a train while it waits at the station and will alight from the train before it leaves. On other occasions police travel on the trains from station to station. On some operations we have observed that police have tended to request that persons indicated by the drug detection dog alight from the train to be searched. On other operations police have tended to search the person on the train. Some police give the person the choice of alighting or being searched on the train.

Questions for consideration

- 11(e) What, if any, privacy concerns exist in relation to the screening by drug detection dogs and searching by police of persons on trains and at railway stations?
- 11(f) What actions are or can be taken by police to minimise any privacy concerns?
- 11(g) What considerations (such as officer safety, passenger privacy and convenience) should be taken into account by police when requesting passengers to alight from trains to be searched?

What has been found on trains and at railway stations?

During the first 12 months of the Drug Dogs Act drug detection dogs indicated that a scent had been detected on a person on state rail property on 2505 occasions.²²¹ On 23% of those occasions drugs²²² were located on the person and in the remaining 77% of searches no drugs were found. The incidence of searches where no drugs were found is higher in rail searches than for other (non-rail) locations – 67% (1049 of 1573) of incidents.

Concern was raised in the NSW Parliamentary debate about the Bill, that 'The major dealers do not ...use public transport when carrying large quantities of concealed drugs.'²²³

The table below shows what was found by police as result of searching passengers on trains and at railway stations during the first 12 months of the legislation. The total number of incidents is greater than the total number of incidents on trains and at railway stations because on some occasions more than one drug or thing was found on a person.

²²¹ Note that police were only able to use drug detection dogs for general drug detection on trains and railway stations without a warrant from May 2002.

²²² We have included 'drug implements' in the definition of 'drugs'.

²²³ Ms Clover Moore, MP, Legislative Assembly Hansard, 6 December 2001, p19879. See also the Hon. Ian Cohen, Legislative Council Hansard, 12 June 2002, p 2977.

Table 5 Results of drug dog indications on trains and at railway stations (22 Feb 2002 to 21 Feb 2003)

Source: NSW Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003

*Here we have used 'other drugs' to include: white powder, steroids, serepax, rohypnol, prescription drugs, morphine, liquid, ice, ED, tablets, alkyl nitrate.

Result of search	No. of incidents
Admitted Drug Contact	1294
Denied Drug Contact	531
No information about drug contact	91
Cannabis	532
Other drugs*	44
amphetamine	15
ecstasy	8
cocaine	1
heroin	1
other (warrant, knife)	6
Nil	1

The largest single recorded find of amphetamines found on a person on a train or at a station weighed 7.8 grams. This is greater than the amount necessary for a charge of deemed supply.²²⁴ However, closer inspection of police records revealed that no person was charged in relation to this 'find' because, following analysis, the substance was found not to be amphetamines. This incident represents the only occasion on trains or at stations, when police appeared to locate an amount of drugs which met or exceeded the quantity required for a charge of deemed supply.²²⁵

The largest single find of cannabis weighed 137.3 grams, which falls short of the amount necessary to charge a person with deemed supply.

In just over 22% of incidents (555 incidents out of 2505) police recorded some kind of action in relation to the person searched. This mirrors the 23% of incidents in which some kind of drug was found on a person searched. The most common action taken by police was to give the person a cannabis caution. Cannabis cautions were issued in 13% (328 of 2505) incidents. The next most common action (158 incidents) was the issuing of some form of court attendance notice.²²⁶ Together these account for approximately 88% (486 of 555) of legal processes initiated by police as a result of searching a person indicated by a drug detection dog whilst on a train or railway station.

A total of 198 young people under 18 years of age were searched on railway property during the first 12 months of the operation of the Drug Dogs Act. Twenty-five young

²²⁴ For an explanation of 'deemed supply' see Chapter 9 'Costs And Benefits Of Using Drug Detection Dogs For General Drug Detection'.

²²⁵ It is possible that police may have taken action in relation to drug supply if other evidence of drug supply was found in relation to a person. We are unaware of any such cases but will make further inquiries for our final report.

²²⁶ A court attendance notice is a notice which compels a person to appear at a specified local court at a certain time and date, to be dealt with according to law. It also specifies that failure to appear might result in arrest or the matter being dealt with in their absence.

people were cautioned on railway property following a drug dog indication and 1 young person received a warning.²²⁷

Question for consideration

11(h) In what ways is the use of drug detection dogs to screen persons for drugs on trains and at railway stations an effective or ineffective tool of drug law enforcement?

'Targeting' train travellers

During the Parliamentary debate about the Drug Dog Act, it was claimed by some members that singling out public transport for the use of drug detection dogs without warrant amounted to a form of discrimination against '...the poorer people who travel by public transport.'²²⁸ Concern has also been expressed that the use of drug detection dogs on public transport is a form of discrimination against the young.²²⁹

This concern about wealth related and age related discrimination is based on the demographic profile of public transport users. If more poor and young people use trains than, say, travel in private cars, then these groups will be more likely to come into contact with drug detection dogs deployed on rail property. While this may be the case, police we have spoken to argue that only those persons the drug dogs indicate as having emitted the odour of a prohibited substance will be searched. Thus the more intrusive act of being searched, as opposed to being sniffed by the drug detection dog, is limited to those persons emitting this odour.

The dogs themselves discriminate solely on the basis of the odour of drugs. Deployment of the dogs to various locations without a warrant is determined by the Drug Dog Act, decisions to use the dogs made by local area commands, and drug related intelligence submitted to and assessed by the Dog Unit. We will review this intelligence information for our final report.

According to Transport Data Centre, 46% of train users have an annual income of less than \$20,800.²³⁰ Transport Data Centre information also reports that the single largest group of train travellers are people aged 11 to 20 years.²³¹ This age group comprises approximately 9% of the total Sydney population.²³²

Dog Unit records do not record information about the income of persons searched by police as a result of drug detection dog indications. However, police data shows that persons aged 11 to 20 years comprised 23.6% (592 of 2505) of those searched on rail property. Persons aged 18 to 24 comprised almost 60% (1486 of 2505) of those searched.²³³

²²⁷ This reference to warnings and cautions is a reference to juvenile warnings and juvenile cautions according to the *Young Offenders Act 1997*.

²²⁸ The Hon. Richard Jones, Legislative Council Hansard, 13 December 2001, p20230.

²²⁹ Ms Lee Rhiannon, MLC, & The Hon. Richard Jones, Legislative Council Hansard, 13 December, 2001, p 20209.

²³⁰ 'Train Users in Sydney', Transport Data Centre, Issues Paper, 2001/01, October 2001, p.1, 2001.

²³¹ *Ibid.*, p 7.

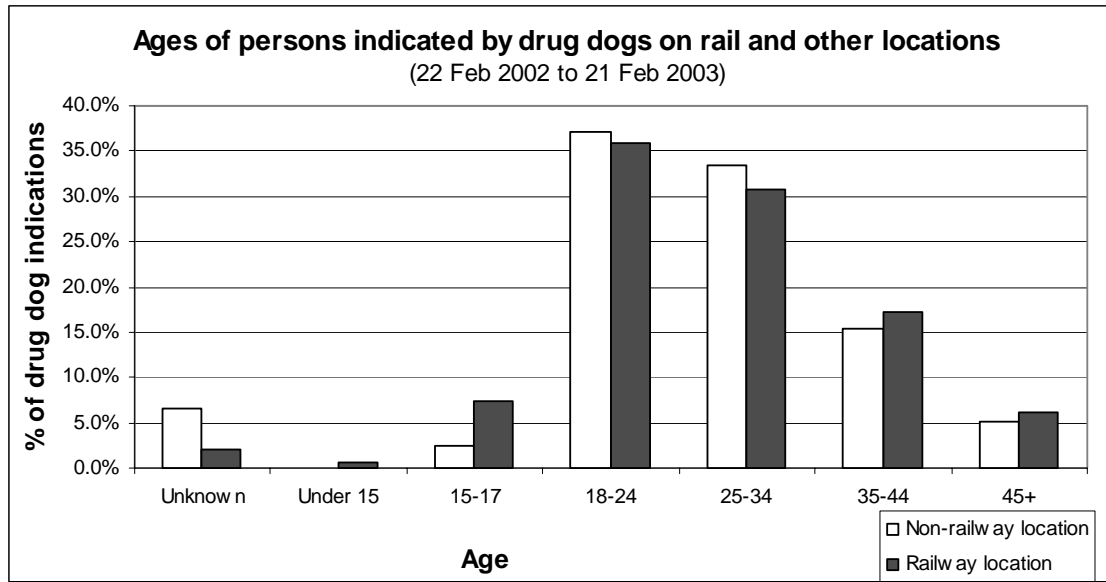
²³² Derived from ABS Basic Community Profiles, 2001 Census Population and Housing.

²³³ NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003.

Figure 8 below indicates that the proportion of young persons searched at railway locations was slightly higher than in other locations. This is likely to be at least partly influenced by the predominance of licensed venues (i.e their adult patronage) among the other locations patrolled by police accompanied by drug detection dogs. 2.4% (38) of persons searched on 'non railway' property were between 15 and 17 years of age compared to 7% (183) of those searched on railway property.

Figure 8

Source: NSW Police Dog Unit Master Spreadsheet, Feb 22 2002 to Feb 21 2003



Question for consideration

11(i) Does the use of drug detection dogs on public transport unfairly target young people or people who are financially disadvantaged?

Chapter 12. Questions for consideration

Chapter 5. Accuracy of drug detection dogs

- (a) In what circumstances might an indication by a drug detection dog be sufficient or insufficient to raise a reasonable suspicion that a person is carrying prohibited substances?
- (b) Police have located drugs in approximately 27% of searches conducted as a result of drug dog indications. In the context of this rate of finding drugs, is it reasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog? Why/why not?
- (c) Does the significant proportion of search incidents in which there is evidence of a 'residual' scent (usually of cannabis) impact upon police practice in forming a reasonable suspicion to search a person.
- (d) In what way is the environment (for example, crowded environments) relevant to the question of reasonable suspicion? Should police be able to give directions to persons for the purpose of screening groups with a drug detection dog?
- (e) Does the practice of searching persons who have had some prior contact with cannabis, either through their own use of being in the vicinity of other's use, reflect fair and effective drug law enforcement?

Chapter 6. Protection of privacy and other civil liberties

- (a) If you have been screened by a drug detection dog or searched by police after a drug dog indication, we are keen to hear about your experience. How did the police relate to you? Where were you searched? How did you feel about the experience? How did the drug detection dog behave?
- (b) What actions can be taken by police to minimise any feelings of embarrassment, humiliation and the like, that may be experienced as a result of being searched in public?
- (c) What, if any, records should be created on the police COPS system in relation to a person searched following an 'indication' by a drug detection dog, if no drugs were found and no admissions or other information arouses police suspicion in relation to the person?
- (d) What are the advantages and/or disadvantages of making records of these search incidents?
- (e) Where records are made of these search incidents, when (if at all), should these records be removed from COPS? What systems are in place to ensure records are appropriately removed from COPS in a timely manner and according to NSW Police policy?
- (f) Is there any evidence to suggest that police are unfairly targeting particular groups, such as the gay and lesbian community, Aboriginal or ethnic groups, or young people, in their deployment of the drug detection dogs? If so, please describe.

- (g) What actions could police take to minimise any perceptions that certain groups in the community are being unfairly targeted by the use of the drug detection dogs?
- (h) When deploying drug detection dogs, what factors should be taken into account to strike the right balance between the fear of dogs experienced by some groups and members of the community, and the policing of drugs offences.

Chapter 7. Harm minimisation

- (a) What impact, if any, does police use of drug detection dogs have on the Medically Supervised Injecting Centre and other facilities and services designed to improve the health and welfare of drug users?
- (b) How does NSW Police drug law enforcement using drug detection dogs contribute to or detract from the NSW Police implementation of harm minimisation objectives?
- (c) Are there ways that the use of drug detection dogs might better facilitate, or interfere less with a harm minimisation approach?
- (d) What, if any, scope is there for the diversion from court of some persons found in possession of small amounts of drugs other than dried cannabis leaf?
- (e) What might be the advantages and/or disadvantages of diverting some of these offenders from court?

Chapter 8. Policing issues

- (a) Are drug detection dog handlers spending an appropriate amount of time 'in the field'? What might be done to increase the amount of time handlers spend doing drug detection work with their dogs?
- (b) Is it feasible for handlers to spend some time stationed in particular regions? What are the advantages/disadvantages of this option?
- (c) Are adequate measures in place to ensure that drug dog handlers can safely perform their duties? How might the safety of handlers and their dogs be improved?
- (d) What other officer safety issues, if any, arise during drug detection dog operations?

Chapter 9. Costs and benefits of using drug detection dogs for general drug detection

- (a) What do you think are the costs and benefits of using drug detection dogs for general drug detection?
- (b) In the context of the nature and quantity of drugs located by drug detection dogs, is the use of the dogs in public places an effective and efficient method of policing the drug trade? Why/why not?

- (c) What evidence is there to support claims that the use of drug detection dogs enhances police intelligence holdings leading to supply related arrests, charges and convictions?
- (d) In what ways, if any, does the use of drug detection dogs impact on the behaviour of drug suppliers and their customers?
- (e) In what ways does use of drug detection dogs affect the drug trade, particularly the supply of illicit substances, in NSW?
- (f) In what ways, if any, do high visibility police operations using drug detection dogs influence the fear of crime in the community?
- (g) What are the benefits and/or disadvantages for businesses, of the use of drug detection dogs?
- (h) Does the Police Powers (Drug Detection Dogs) Act provide an effective and appropriate legislative framework for police to use drug detection dogs to target drug supply?

Chapter 10. Legal interpretation issues

- (a) Is legislative amendment required (and if so what kind of amendment) to allow police, without a warrant, to use drug detection dogs in relation to persons seeking to enter licensed premises (or other premises or passenger vehicles specified in section 7), if those persons are in or on a public place (e.g. the footpath) outside those premises?
- (b) What are the benefits/disadvantages of using drug detection dogs to screen entry to premises and public passenger vehicles?
- (c) Does the Drug Dogs Act in its present form provide sufficient clarity in relation to the use of drug detection dogs for general drug detection on private premises?
- (d) Under what circumstances can or should police screen and search items not accompanied by their owners?
- (e) In what circumstances can police use drug detection dogs to screen premises, vehicles or things as opposed to 'persons'?
- (f) According to the current legislative provisions can police conduct general drug detection outside the terms of Part 2 of the Drug Dogs Act if they do so by consent? What are the advantages/disadvantages of this type of policing?
- (g) In what circumstances might it be reasonable to base a decision to search a person on that person's reaction to a drug detection dog?

Chapter 11. Use of drug detection dogs on trains and at railway stations

- (a) What difficulties and/or advantages are presented for police using drug detection dogs, and the community, by the selection of railway lines in the Drug Dogs Regulation?

- (b) Are the rail routes selected for use of the drug detection dogs without a warrant the most appropriate lines?
- (c) Are police monitoring the effectiveness of the localities prescribed (and those not prescribed) by the regulation to ensure appropriate public transport routes are targeted? If yes, what methods are employed and how often are the prescribed routes reviewed?
- (d) What advantages or disadvantages might apply to extending use of drug detection dogs (without police obtaining a warrant) to the entire CityRail network?
- (e) What, if any, privacy concerns exist in relation to the screening by drug detection dogs and searching by police of persons on trains and at railway stations?
- (f) What actions are or can be taken by police to minimise any privacy concerns?
- (g) What considerations (such as officer safety, passenger privacy and convenience) should be taken into account by police when requesting passengers to alight from trains to be searched?
- (h) In what ways is the use of drug detection dogs to screen persons for drugs on trains and at railway stations an effective or ineffective tool of drug law enforcement?

Appendix A: About the statistics

Much of the statistical information in this discussion paper has been formulated from a spreadsheet administered by the NSW Police Dog Unit. The Dog Unit uses the spreadsheet to record information about all incidents in which a drug detection dog makes an indication, whether or not any drugs or other offences are detected. This is compiled from tally sheets completed by police during all operations that use a drug detection dog. The spreadsheet also includes information about the use of drug detection dogs at residential premises with the authority of a search warrant, and to screen people, vehicles and buildings.

The extract from the spreadsheet for our analysis excludes data about searches of residential premises.²³⁴ We have also attempted to remove records related to screening of vehicles and buildings from our analysis.²³⁵

Unless otherwise specified, the statistical information relates to all records for which police have recorded the 'incident type' of 'person screen' (other than those conducted at a private residential location) for use of the drug detection dogs for the period 22 February 2002 until 21 February 2003. This focuses our analysis on the first year of use of the dogs in public places for the purpose of 'general drug detection'.

The information in the Dog Unit spreadsheet is indicative only. It is generally not systematically checked by police for errors or inaccuracies. It represents the initial information known by police about an incident. In some instances, initial information may be incorrect. For example, police may initially believe that a substance is a particular prohibited drug but after analysis it may prove to be another legal or illegal substance.

Explanation of the terminology

Drug detection dog indications

The Dog Unit's spreadsheets document each time a drug detection dog 'indicates' to its handler that it has detected the presence of an illegal substance. We are not currently able to determine the number of discrete 'operations' which have utilised the dogs.²³⁶ Thus, when we report on the 'use' of the drug detection dogs (for example by month, or by location) we are reporting the frequency of indications not the frequency of deployment.

In addition, it is important to note that an 'indication' is not the same as a 'detection'. An indication by a drug detection dog does not necessarily mean that police located a prohibited substance. However, the vast majority of indications, will be followed by a police search of the person subject to the indication.

²³⁴ This meant removing those records with an incident type of 'search warrant' or a premise type of 'residential'.

²³⁵ We have removed records with an incident type of 'vehicle screen' or 'building screen' but some incidents of this type may still be included in the data.

²³⁶ This is because of the nature of the Dog unit's spreadsheets which were not designed to report on this type of information.

Whether or not drugs are found following a search of a person

Police categorise their interaction with members of the public subject to a drug detection dog indication in four ways.

a) *Drugs found*: When drugs are located by police the drug type and weight or amount (e.g. the number of tablets) are usually recorded by police.

b) *Admitted Drug Contact*: When no drugs are found following a search of a person, police record information based on informal questioning of the person searched. Police will often ask the person whether they have been in contact with drugs. Often police will ask if the person has 'had a smoke?' If the person answers positively to this question, police will note down that the person admitted contact with drugs. Positive responses to this question might include admitting to personal use of a drug, admitting that friends had smoked near the person or that the person had been at a party, or club, where drugs may have been used. We will call this category, 'Admitted Drug Contact'.²³⁷

c) *Denied Drug Contact*: If, when asked about contact with drugs, the person denies any contact with drugs, police also note this down. We will call this category, 'Denied Drug Contact'.²³⁸

d) *No Information About Drug Contact*: If police have no information in relation to the person's contact with drugs, for example because police did not ask about drug contact, or the person chose to remain silent or police did not record the response to the question, this is also recorded. We will call this category, 'No Information About Drug Contact'.²³⁹

The category 'nil' is sometimes used by police to describe a situation where a vehicle, building, or property is searched but nothing is found.²⁴⁰

Categorisation of drug types

The spreadsheet which forms the basis of much of our statistical analysis, uses a range of terms to describe various drugs. On occasion, we have grouped some of these terms into categories for ease of analysis.

We have used the category 'Other' to include records which refer to cash or weapons being found as a result of a search of a person.

We have used the term 'Other drug' to include steroids, Serapax, Rohypnol, Morphine, ED, Ice, Alkyl Nitrate, tablet, pill, and powder. Relatively small amounts of these drug types were located by police during the first year of the Drug Dogs Act's operation.

We have used the term 'drug implements' to indicate that implements for the use of drugs were found on the person.

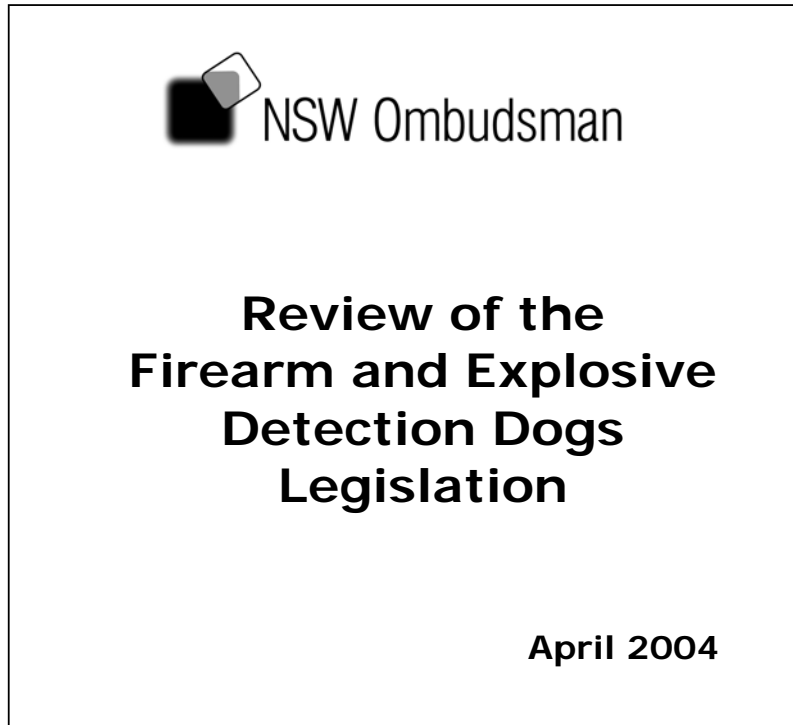
²³⁷ Police label this category as 'Residual Admitted'.

²³⁸ Police label this category as 'Residual Denied'.

²³⁹ Police label this category as 'Residual'.

²⁴⁰ The result of a search of a person on whom no drugs were found might be described as 'nil' if the search was initiated by the police officer's 'reasonable suspicion' and the drug detection dog later brought in to assist. While we are not focusing on the use of drug detection dogs in this way, a small number of records may refer to this type of search.

The following discussion paper is also available from the NSW Ombudsman:



The *Firearms Amendment (Public Safety) Act 2002* commenced in July 2002 and authorises police to use firearm and explosive detection dogs (FED dogs). In addition to firearms and explosives, FED dogs are capable of detecting a variety of related items, such as ammunition and gunshot residue.

The Ombudsman is required by s72E of the *Firearms Act* to keep under scrutiny the exercise of the powers given to police under Part 6A for two years.

For a copy of the discussion paper or for more information, please contact Michelle Chung on 02 9286 0973 or tollfree on 1800 451 524. The discussion paper is also available on our website www.ombo.nsw.gov.au.