



Review of the *Police Powers
(Drug Detection Dogs) Act 2001*

June 2006

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(Drug Detection Dogs) Act
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Chapter 13. Targeting drug supply

This chapter examines the impact that the Drug Dogs Act has had on drug supply by analysing the charges, prosecutions and penalties for supply that have resulted from the use of the drug detection dogs during the first two years of operation of the Drug Dogs Act. Also included in this chapter are the various views we received from submissions and other sources on whether drug detection dogs effectively target drug supply.

13.1. Objective of the Drug Dogs Act

During the second reading speech of the Police Powers (Drug Detection Dogs) Bill 2001 the (then) Minister for Police, the Hon. Michael Costa MLC, stated that the legislation was drafted in recognition of the need for police to use drug detection dogs to identify persons involved in the supply of prohibited drugs.⁸²¹ The Minister stated that the legislation would focus on drug supply:

*The bill is aimed primarily at detecting and prosecuting persons committing offences relating to the supply of prohibited drugs and plants. ... It is clear that the activity envisaged is drug dealing.*⁸²²

However, the Minister recognised that the legislation may also result in the detection of low-level drug users who were not involved in supplying or dealing drugs. The Minister suggested that the detection of low-level drug users was consistent with Government's approach to harm minimisation insofar as it provided an opportunity for individuals to be cautioned under the Cannabis Cautioning Scheme, or diverted into various drug treatment schemes.⁸²³ In relation to the possibility of low-level drug users being detected the Minister stated:

*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.*⁸²⁴

On another occasion the 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 police will also target them.*⁸²⁵

During parliamentary debate on the legislation some members of Parliament argued that the use of drug detection dogs would more likely focus on low-level drug users. Ms Clover Moore MP, Member for Bligh, suggested that the use of drug detection dogs would not target the 'Mr Bigs in the supply chain':

*The use of sniffer dogs in public places means that thousands of dollars in police resources are dedicated to catching recreational drug users, people with addictions and the occasional small-time dealer. The major dealers and traffickers do not go to public places or use public transport when carrying large quantities of concealed drugs. The Government's argument that this legislation is focused on couriers and dealers is not supported by available evidence or reports on the use of sniffer dogs. The targeting of recreational drug users, rather than dealers and traffickers, is contrary to progressive drug policy that channels users into health services and rehabilitation.*⁸²⁶

In correspondence to this office Ms Moore 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 chance, rather than by design that the dogs might detect a supplier.*⁸²⁷

Ms Moore was also concerned that the legislation would criminalise drug users, 'which can have serious consequences throughout the rest of their lives'.⁸²⁸

Mr Barr MP, Member for Manly, also expressed apprehension about the legislation:

*I am also concerned about the people the bill will impact upon primarily: young people – the kinds of people who frequent public places, hotels and so on. They will be stopped and searched. I suspect that most young people who are caught with anything will be caught with a small amount of marijuana. The issue is whether we want to alienate a generation of young people who are basically users, and not suppliers or traffickers. ... If we are serious about the drug issue, we must attack the suppliers and traffickers – in other words, the sources of the drug supply. I do not believe that the bill addresses that issue.*⁸²⁹

13.2. What is meant by ‘supply’?

Before discussing whether the Drug Dogs Act has been successful in its primary objective of targeting supply, it is useful to look at what is meant by the term ‘supply’. This task is complicated by the fact that there are no consistent definitions of what constitutes the different levels of supply within the drug trade.

One common model for characterising the structure or levels of drug supply is the three-tiered model that separates drug supply into low, medium and high levels.⁸³⁰ Low-level drug supply is usually carried out by street dealers who are often themselves drug users utilising the profit gained from drug dealing to finance their own drug needs. Medium-level drug supply usually involves some level of organisation on an ad hoc basis, and may involve informal syndicates or groups of people co-ordinating the manufacture, cultivation and sale of drugs for profit. High-level drug supply usually involves the ‘Mr Bigs’ of organised crime syndicates who are responsible for the importation and trafficking of drugs. It is worth noting that this is merely a model and that drug dealers, pushers, suppliers or traffickers, as these terms are commonly understood, may be involved in more than one level of the drug supply chain.

13.3. Legal definition of ‘supply’

The principal New South Wales legislation regulating drug offences is the *Drug Misuse and Trafficking Act 1985*.

Section 25(1) of the *Drug Misuse and Trafficking Act* provides:

A person who supplies, or who knowingly takes part in the supply of, a prohibited drug is guilty of an offence.

Section 3(1) of the *Drug Misuse and Trafficking Act* defines a ‘prohibited drug’ as any substance, other than a prohibited plant, specified in Schedule 1 of the Act. A ‘prohibited plant’ is defined as a cannabis plant.

Section 3(1) also contains a broad definition of supply:

supply includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

The courts have determined that the definition of supply in the *Drug Misuse and Trafficking Act* is not exclusive. That is, supply retains its ordinary meaning to furnish, provide, afford, make available as well as the extended definition contained in section 3(1).⁸³¹

13.3.1. Deeming provision

Section 29 of the *Drug Misuse and Trafficking Act* provides:

A person who has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall ... be deemed to have the drug in his or her possession for supply, unless:

(a) the person proves that he or she had the prohibited drug in his or her possession otherwise than for supply

The effect of section 29 (‘the deeming provision’) is that any person found with at least a ‘traffickable quantity’ of a prohibited drug is deemed to be in possession of the drug for the purpose of supply and may be charged with supply under section 25. This is sometimes referred to as a ‘deemed supply’ charge. The weight or ‘traffickable quantity’ of drug required for a deemed supply charge is prescribed in Schedule 1 of the *Drug Misuse and Trafficking Act* and varies according to the drug type. Schedule 1 also contains the prescribed ‘small quantity’ for each drug type.

The expression ‘not less than the traffickable quantity’ in section 29, which put another way means at least a traffickable quantity, will be simply referred to as ‘traffickable quantity’ for convenience throughout this chapter.

13.3.2. Drugs commonly detected

Table 21 shows the amounts of prohibited drugs most commonly found following indications by drug detection dogs for the two-year review period, and the prescribed traffickable and small quantity for each drug type. The prescribed quantity for each drug type is determined by Parliament.

Table 21. Gross weights* of drugs located and prescribed traffickable and small quantities

Drug type	Total (g)	Highest recorded amount (g)	Median (g)	Average (g)	Traffickable quantity (g)	Small quantity (g)
Cannabis	9731.31	301	1.61	4.38	300	30.0
Ecstasy	407.64	30.9	1.0	1.87	0.75	0.25
Meth/ amphetamine	306.2	41	0.8	1.49	3.0	1.0
Cocaine	25.99	5.2	1.0	1.53	3.0	1.0
Heroin	13.24	4.3	0.46	0.95	3.0	1.0

Source: Derived from the Results Spreadsheet, 22 February 2002 to 21 February 2004 and Schedule 1 of the *Drug Misuse and Trafficking Act 1985*.

* See below (at paragraph 13.3.3) for an explanation of gross weights.

Table 21 illustrates that with the exception of ecstasy, the median and average weights of the other commonly found drugs were below the prescribed traffickable quantity. In relation to cannabis, which was located in almost 84% (2233 of 2664) of incidents where one or more drugs were found, the median and average weights were well below the prescribed small quantity. In relation to meth/amphetamine, cocaine and heroin, the median weights detected were less than or equal to the prescribed small quantity for each drug type.

In the case of ecstasy, which was located in 8% (226 of 2664) of incidents where one or more drugs were found, the median and average weights were above the traffickable quantity. This is probably due, in part, to the fact that the prescribed traffickable quantity of ecstasy (0.75 grams) is much lower than meth/amphetamine, cocaine and heroin (3.0 grams).

13.3.3. Drug packaging

The drug amounts for recorded finds in the above table represent gross weights insofar as they also include the weight of any packaging that the drug was in when located by police. It is police practice to weigh the drug in its packaging to avoid any contamination or corruption issues. One result of this practice is that the gross drug weight usually overstates the net weight of the drug that is considered by the courts for the purpose of determining drug offences. The net weight is usually ascertained some time later after analysis at the official laboratory, which issues a certificate (known as the 'analyst's certificate') stating what the substance seized actually was, its net weight and purity. However, an analyst's certificate is not always required. For example, an analyst's certificate is rarely obtained in possess charge matters where the accused makes admissions that the substance is a drug and pleads guilty at court.

It is worth noting that what the drug is mixed with, known as the admixture,⁸³² is counted as part of the drug weight. For example, an ecstasy tablet may contain the active drug (known as MDMA) and other ingredients that may or may not be prohibited drugs. Both the active drug and any admixtures are included in the calculation of net weight.

13.3.4. Proving supply

To prove a supply charge based on the deeming provision, the prosecution must first establish beyond a reasonable doubt that the accused was knowingly in possession of a traffickable quantity of a prohibited drug. If the prosecution are able to do this, the onus shifts to the accused to prove that, on the balance of probabilities, possession of the drug was otherwise than for supply. For example, an accused may provide and/or give evidence to a court that he or she was in possession of the drug for personal use and not for the purpose of supply.

Of course the prosecution may also present other evidence that may lead to the conclusion that the accused knowingly had possession of the drug for the purpose of supply. For example, the prosecution may present evidence that at time the accused was found to be in possession of the drug, the accused was also in possession of large amounts of cash in small denominations, scales, plastic bags, telephone lists or other paraphernalia, which may help prove that the accused was in possession of the drug for the purpose of supplying it.

13.4. Supply charges

To assess the impact that the Drug Dogs Act has had on targeting drug supply we undertook an analysis of the supply charges that were a result of police operations utilising drug detection dogs during the two-year review period. This analysis focused on legal outcomes that could be directly attributed to the operation of the Drug Dogs Act. It is recognised that non-legal outcomes may have also resulted from the use of the Drug Dogs Act. However, possible non-legal outcomes were not amenable to thorough assessment for the purposes of our review.

Examples of some non-legal outcomes that may have been the result of police operations utilising drug detection dogs include:

- disruption and/or displacement of drug markets
- reduction in the supply of and demand for prohibited drugs
- change in drug use patterns and behaviours
- modification of the *modus operandi* employed by drug dealers, suppliers or traffickers
- impact on drug-related crime, and
- intelligence gathering and sharing by NSW Police.

13.4.1. Methodology

The Results Spreadsheet contains data on operations where police utilised drug detection dogs. When a drug was located on a person as a result of an operation utilising drug detection dogs, police would record the following information on the spreadsheet: COPS event number; personal and incident details; drug type; gross drug weight; and whether a drug-related charge was preferred. However, police did not record the type of drug charge that was preferred. Actual charge information was only recorded in COPS under the unique record for the person.

As the spreadsheet contained in excess of 10,000 records, it was not feasible to check every COPS entry to ascertain if NSW Police preferred a supply charge. NSW Police were also not able to readily identify supply charges that were preferred as a result of operations utilising drug detection dogs.⁸³³ In lieu of not being able to readily identify supply charges, we decided to examine all COPS events where a traffickable quantity of drug was detected. This examination revealed all matters where police were able to prefer a supply charge based solely on the deeming provision.

In all, 141 events (1.38% of all indications) were identified where the amount of drug recorded involved a traffickable quantity. COPS entries were examined for all these events to determine what, if any, charges police had preferred in relation to the drugs detected. In six of the 141 events no charge was laid by police for the following reasons:

- juvenile cautions were given in two events
- drug (5.68 grams of meth/amphetamine) was located in the toilet of a nightclub
- drug (1.1 grams of ecstasy) was located on a street
- drug (8.3 grams of cannabis and 4.05 grams of meth/amphetamine) was located in a vehicle in a car park as a result of a drug detection dog indication and the car owner denied knowledge of the drugs (and thus proving possession may have been difficult), and
- police had yet to interview an accused in relation to the drug matter.

A total of 135 events were identified where a person was detected with a traffickable quantity of a prohibited drug and subsequently charged with a drug-related offence. (See paragraph 13.4.4 below for an outline of drug-related offences.) For a majority of these events we obtained a transcript of the court proceedings. In the few cases where a court transcript was not available, we relied on information recorded in COPS to ascertain the court outcome.

We also examined the prior convictions of those charged and divided these into three categories:

- no prior conviction
- non drug-related prior conviction, and
- drug-related prior conviction.

Information regarding prior convictions was normally gleaned from the court transcript. If this information was not in the transcript, we examined COPS records to ascertain if the accused had any prior convictions. In some cases it was necessary to examine COPS records to ascertain the nature of a prior conviction in order to categorise it as either drug or non-drug related.

13.4.2. Limitations of methodology

The major limitation of the methodology adopted was that we were unable to capture supply charges in circumstances where the amount of drug detected was less than the traffickable quantity. It is likely that only a few supply charges would have resulted from circumstances where police located less than a traffickable quantity, and any such charges are likely to have only involved low-level street dealers given the small amounts of drugs involved.

During the course of our review we discovered three matters where police preferred supply charges where the amount of drug detected was less than the traffickable quantity. These are described below (at paragraph 13.4.3). We also asked NSW Police if they were aware of any other supply charges that were not based on the deeming provision.⁸³⁴ NSW Police were not able to identify other supply charges for the review period⁸³⁵ and made the following comment in relation to the difficulty in identifying supply charges:

*It may be possible that further charges exist. However, it is not possible, using data extraction methods on NSW Police systems, to obtain data that differentiates between supply and deemed supply charges. Obtaining this data would require NSW Police to go through each and every relevant charge. Which, given the time this would take, NSW Police does not propose to do.*⁸³⁶

13.4.3. Supply charges where drug amount detected was less than the prescribed traffickable quantity

The following three examples illustrate some of the circumstances in which a supply charge may arise where the amount of drug detected is less than the traffickable quantity. All three examples involve operations where a drug detection dog was utilised.

Example 1

A 24-year-old male was found in possession of 94.29 grams of cannabis (300 grams is the traffickable quantity), and a pocket knife with a one-inch blade at a western Sydney railway station. The cannabis was packaged in 16 separate bags. It was alleged that the accused made admissions regarding his intention to sell the cannabis to members of the public and to having self-administered two joints of cannabis that day. In the COPS event narrative reference is made to the definition of supply in the *Drug Misuse and Trafficking Act* that covers 'possession for the purpose of supply'. Based upon the alleged admissions, and presumably the manner in which the drug was packaged, police charged the accused with supply prohibited drug. The accused was also charged with possess prohibited drug (back-up charge), self-administer prohibited drug, and custody of knife in a public place. The accused was convicted on all charges except the more serious supply offence.⁸³⁷

Example 2

A 21-year-old male was found in possession of 61.73 grams of cannabis outside an inner-city railway station. The cannabis was packaged in what was described in the COPS event narrative as two medium-sized resealable plastic bags. The accused stated to police that the cannabis was for his personal use and that he bought the two bags of cannabis because: 'I am on the dole and usually buy a quater (sic) which is gone in a week. That lot [the cannabis] will last me a few months.' Given that the accused stated to police that the drug was for personal use, it is unclear on what basis police decided to charge him with supply prohibited drug and possess prohibited drug (back-up charge). At court the supply charge was withdrawn and the accused was convicted on the possess charge.⁸³⁸

Example 3

A 21-year-old male was found in possession of three ecstasy tablets (0.7 grams gross weight) and small amounts of cannabis (2.2 grams gross weight) and meth/amphetamine (0.6 grams gross weight). The cannabis and meth/amphetamine were each contained in two resealable plastic bags, and the ecstasy in a single resealable plastic bag. The accused was charged with supply prohibited drug and three counts of possess prohibited drug (one count being the back-up possess charge). The accused pleaded guilty to supply and two counts of possess. The COPS event narrative, the Police Fact Sheet and the court transcript⁸³⁹ appear to suggest that the accused was charged with supply on the basis of the deeming provision, notwithstanding that the gross weight of ecstasy was less than the prescribed traffickable amount of 0.75 grams. However, the drugs in this matter were analysed and we obtained a copy of the analyst's certificate from police (which does not appear to have been presented to the court), which stated that the net weight of ecstasy was 0.77 grams. It is a little unusual that the net weight of the drug increased upon analysis, although this may be a result of the fact that when weighing the drug in the resealable plastic bag, police were using scales that only measured in tenths and not hundredths of grams.⁸⁴⁰

13.4.4. Drug-related offences

In all matters included in this analysis, police laid one or more of the following charges for drug-related offences:

- possess prohibited drug ('possess charge')⁸⁴¹
- possession of equipment for administering a prohibited drug⁸⁴²
- self-administration/attempt to self-administer prohibited drug⁸⁴³
- unlawfully possess a prescribed restricted substance,⁸⁴⁴ and
- supply prohibited drug ('supply charge').⁸⁴⁵

13.4.4.1. Back-up possess charge

Ordinarily police charging a person with a supply charge would also prefer a back-up possess charge.⁸⁴⁶ This is done to ensure that the person charged with supply is required to face the less serious possess charge in circumstances where the supply charge is withdrawn or dismissed at court.

We noted two occasions where a back-up possess charge was not preferred by NSW Police. In both cases, the supply charge was either withdrawn or dismissed, with the result that the accused did not face any possess charge in relation to the drug that was the subject of the supply charge.⁸⁴⁷

13.4.5. Demographic information

As mentioned above, 135 events were identified where a person was detected with a traffickable quantity of at least one prohibited drug and subsequently charged with a drug-related offence.

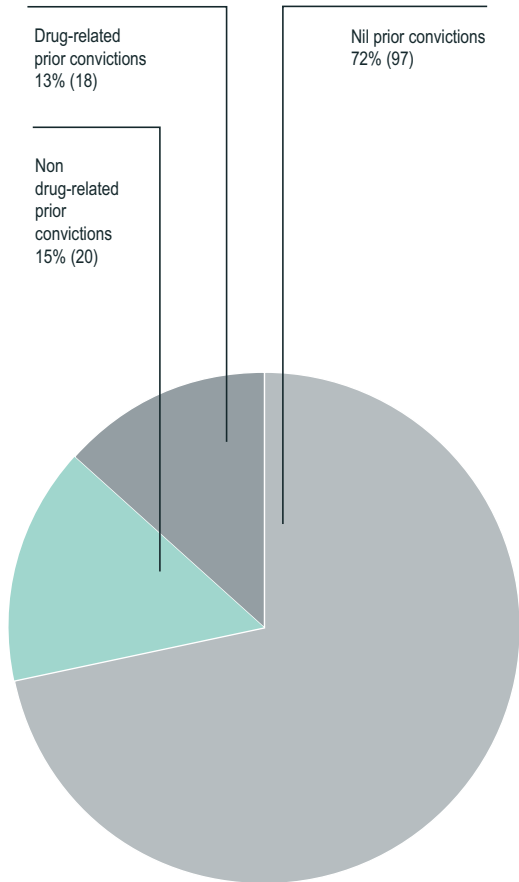
In all, 90% (121 of 135) of those charged were male and 10% (14 of 135) were female. The ages of persons charged ranged from 15 to 41 years of age. The median age was 23 and the average age was 24.6.

Figure 18 illustrates that a majority (72%) of those charged were first-time offenders who had no prior convictions, and only 13% had drug-related prior convictions. Or put another way, 87% of those charged had no previous convictions related to drugs.

13.4.6. Drugs found where a traffickable quantity of at least one drug was detected

By far the most commonly detected drug throughout the review period was cannabis, which was located in 83.8% (2233 of 2664) of incidents where one or more drugs were detected. This was followed by ecstasy, which was located in 8.5% (226 of 2664) of incidents in which drugs were found, and then by meth/amphetamine, which was located in 7.7% (205 of 2664) of incidents. However, for the events identified where a prescribed traffickable quantity of drug was detected, a different picture emerges as illustrated by Figure 19.

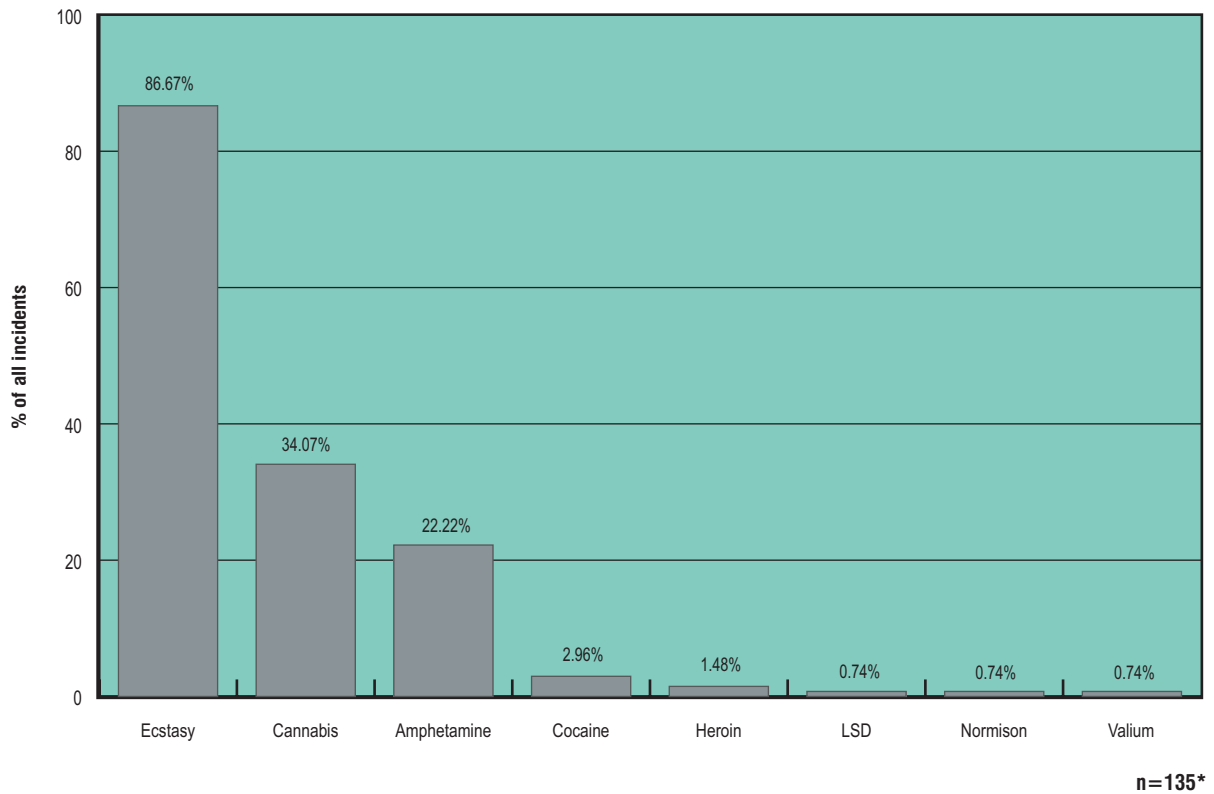
Figure 18. Prior convictions for persons found with a traffickable quantity of drug



Source: Court transcripts and COPS.

n=135

Figure 19. Drugs found where a traffickable quantity of at least one drug was detected



*Note: more than one drug type was found in some incidents

Source: Derived from the Results Spreadsheet, 22 February 2002 to 21 February 2004 and COPS.

Figure 19 shows all drugs located where a traffickable quantity of at least one drug was found on a person. For example, a person may have been found to be in possession of a traffickable quantity of ecstasy, but also had a small amount of cannabis in their possession at the same time.

As Figure 19 demonstrates, ecstasy (86.67%, 117 of 135 of incidents) was the drug most commonly detected where one or more traffickable quantities of drugs were located.

Although cannabis was the next most commonly detected drug (34.07%, 46 of 135 of incidents), there was only one event during the whole review period where a traffickable amount of cannabis was located. In that incident the person was only charged with possess prohibited drug.⁸⁴⁸ Thus in all of the above events where cannabis was located, a traffickable quantity of another drug was also located.

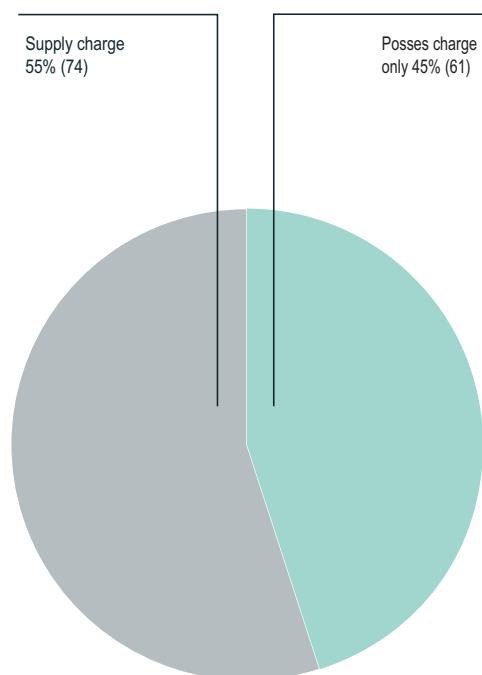
Traffickable quantities of meth/amphetamine and cocaine were also located. See below (at paragraph 13.5.3) for a description of drug types that led to successful prosecutions for supply.

13.4.7. Charges preferred by NSW Police

When a person is detected with a traffickable amount of a prohibited drug, police may charge the person with supply based solely on the deeming provision. However, there are a number of factors that police may consider when deciding what, if any, charge to prefer:

- estimated net weight of the drug (even though police only have gross weight)
- probability of being able to prove possession of the drug
- credibility of any admissions made by the accused, and
- the age of the accused (a juvenile may be warned or cautioned rather than charged in certain circumstances).⁸⁴⁹

Figure 20. Charges preferred where a traffickable quantity of drug located



Source: COPS.

n=135

As Figure 20 illustrates, police chose to prefer a supply charge in 55% (74 of 135) of cases where the gross drug weight involved a prescribed traffickable quantity. Whilst we are not able to accurately determine why police did not prefer supply charges in the other 45% (61 of 135) of cases, it would appear that one or more of the above factors led to the decision by police to prefer a possess charge. There is no criticism of the police practice in preferring a possess charge given the number of factors, some of which are discretionary, which may influence the decision to only prefer a possess charge. The rate of withdrawal of supply charges, discussed below (at paragraph 13.4.8), also indicates that it is prudent for police to take factors beyond the mere drug weight into account when considering the appropriate charge.

13.4.8. Withdrawal of supply charges

As mentioned above, NSW Police initially preferred 74 supply charges. Of these, a high number 67.6% (50 of 74) were withdrawn at court. There are a variety of reasons why a supply charge may be withdrawn. NSW Police advised this office that factors that may influence the decision to withdraw a supply charge include:⁸⁵⁰

- Police must weigh the drug in its packaging, which upon analysis, may be reduced to a net weight below the prescribed traffickable quantity.

- Prosecutors may determine that there is no reasonable prospect of conviction for the supply charge and only proceed with the back-up possess charge.
- A witness relied upon cannot be found to provide evidence, or has recanted or changed their evidence.

In our analysis of transcripts we also noted the following examples where supply charges were withdrawn:

- Advice was obtained from the Director of Public Prosecutions to withdraw the supply charge.
- No evidence was offered, usually in circumstances where the analyst's certificate was unavailable and the magistrate was unwilling to entertain any more adjournments based on the inconvenience caused to the accused by the delay in obtaining the analyst's certificate.
- The supply charge was withdrawn because of a plea of guilty to possess charge.

Given that over two-thirds of supply charges were withdrawn, we were concerned that, on occasion, police may be preferring supply charges that have little or no prospect of success at court.

From our analysis it appears that in some cases police have preferred supply charges notwithstanding that one or more of the following circumstances was present:

- voluntary admissions made by the accused that the drug was for personal use
- it was evident that the packaging contributed to the weight of the drug exceeding the prescribed traffickable quantity, or
- no other evidence was located to suggest that the accused was in possession for the purpose of supply.

Whilst the police practice of preferring supply charges may possibly serve some educative purpose insofar as the accused is required to reflect on the potential consequences of their alleged wrongdoing, the practice may contribute to an already stretched workload for police, prosecutors and the courts. Further, the practice may lead to unnecessary expenditure for both the accused and the public purse. For example, the accused may have to obtain legal representation and attend a number of mentions⁸⁵¹ before the matter is set down for hearing. And the prosecution will have to incur the expense in obtaining an analyst's certificate (usually required as evidence for supply charges), and ensuring that police and other witnesses are available in the event that the accused pleads not guilty. See below (at paragraph 13.4.9.1) for data on the high success rate for persons who pleaded not guilty to supply during the review period.

The Office of the Director of Public Prosecutions noted that the traffickable amount of ecstasy is relatively small which more often than not results in the withdrawal of supply charges in relation to ecstasy:

The police charge the accused on the basis of the [gross] weight of the drug. In this Office's experience the weight of the drug determined by the police is without exception greater than the weight determined by the analyst, as the police weigh the drug with its packaging. This frequently, particularly in respect of ecstasy, results in the person being charged with an indictable offence (deemed supply) where on the eventual receipt of the analyst's certificate (for which delays can be of up to 2 – 3 months) it is determined the drug is not of an indictable quantity or is only just over the indictable quantity. Where the quantity is just over (or under) the indictable quantity there is usually no indication the accused was in possession of the drug for any other reason than personal use.⁸⁵²

It is our view that police responsible for charging alleged drug offenders would benefit from some guidance on whether to prefer a supply charge when faced with circumstances in which a supply charge has little or no reasonable prospects of success. Of course the decision not to prefer the supply charge requires police to weigh up all of the available evidence. However, if after the evidence is assessed there appears to be little or no reasonable prospects of success in prosecuting the supply charge, then consideration should be given to only preferring a possess charge.

13.4.9. Prosecution of supply charges

Of the remaining 24 supply charges, that is, supply charges that were not withdrawn:

- 17 persons pleaded guilty to supply
- one person was found guilty after pleading not guilty
- five persons pleaded not guilty and were found not guilty, and
- one person failed to appear at court to answer the supply charge. An arrest warrant was issued and at the time of writing this matter had still not been finalised.

13.4.9.1. Pleading not guilty to supply charge

A total of six persons pleaded not guilty. Of these, four were found not guilty after satisfying the court that the possession of the drug was for personal use.

The fifth person had supply and possess charges dismissed after the prosecutor was unable to produce the warrant that authorised the police operation that took place along streets in an inner-city suburb. The magistrate held that the search of the accused that uncovered the evidence of drugs was unlawful given that the authority to carry out the operation could not be established. The magistrate did not exercise the discretion to admit the evidence of the drugs located and in the circumstances the charges were dismissed.⁸⁵³

The sixth person was found guilty on the basis that the court held that the accused purchased six ecstasy tablets (2.02 grams net weight) for himself and his girlfriend, which brought the facts within the extended definition of supply insofar as the accused intended to make available or provide to his girlfriend the ecstasy located in his possession.

13.4.9.2. Proven supply charges

Our supply charge analysis revealed that 18 persons were successfully prosecuted for supply.

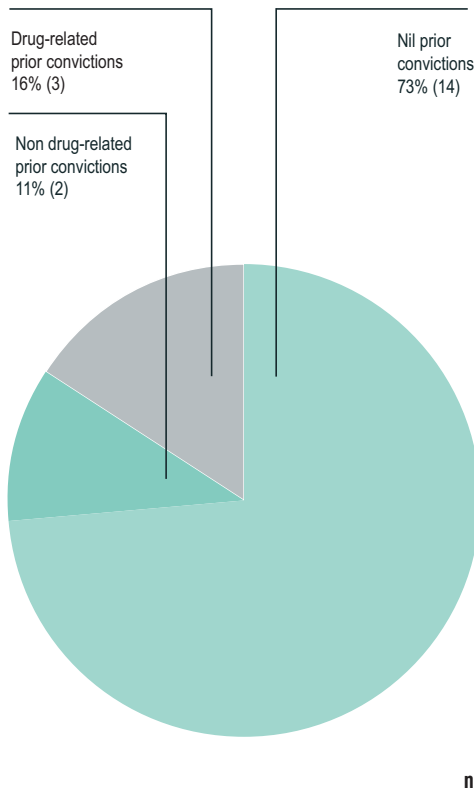
In addition, as noted above (at paragraph 13.4.3, Example 3), an individual pleaded guilty to a supply charge where the amount of drug recorded by police was less than the traffickable quantity.

Thus a total of 19 individuals were successfully prosecuted for supply for the two-year review period.

13.5. Successful supply prosecutions

Over the entire two-year review period, 10,211 drug detection dog indications resulted in a search of a person. Of these indications, it appears that 0.19% (19 of 10,211) led to a successful prosecution for supply. If only the indications where a drug was located as a result of a search are considered, then 0.71% (19 of 2,664) of indications resulted in a successful supply prosecution. In either case, the number of successful supply prosecutions is less than 1% of indications over the review period. Or put another way, over 99% of indications did not lead to a successful supply prosecution.

Figure 21. Prior convictions for persons successfully prosecuted for supply



n=19

Source: Court transcripts and COPS.

13.5.1. Demographic information

As discussed above, 19 individuals were successfully prosecuted for supply.

Approximately 90% (17 of 19) of those successfully prosecuted for supply were male and 10% (2 of 19) were female. The ages of offenders ranged from 17 to 36 years of age. The median age was 22 and the average age was 23.7.

The criminal history data for those successfully prosecuted for supply is not significantly different to that for persons detected with a traffickable quantity who were charged with a drug-related offence as discussed above (at paragraph 13.4.5).

Figure 21 illustrates that a majority (73%) of persons successfully prosecuted for supply were first-time offenders in that they had no prior convictions, and only 16% had drug-related prior convictions. Or put another way, 84% of persons convicted of supply had no previous convictions related to drugs.

13.5.2. Places where drug detected in proven supply cases

By far the most common place where a drug detection dog indication occurred during the review period was public transport, accounting for 62.9% (6423 of 10,211) of indications, followed by licensed premises 20.8% (2125 of 10,211), road/street/mall 11.7% (1193 of 10,211), and dance party 2.4% (240 of 10,211) of indications. However, for the proven supply cases, a different picture emerges as illustrated by Figure 22.

As Figure 22 demonstrates, the majority (52.6%) of proven supply cases arose from detections at dance parties, followed by licensed premises (31.6%), road/street/mall (10.5%) and public transport (5.3%).

13.5.3. Drug types detected in proven supply cases

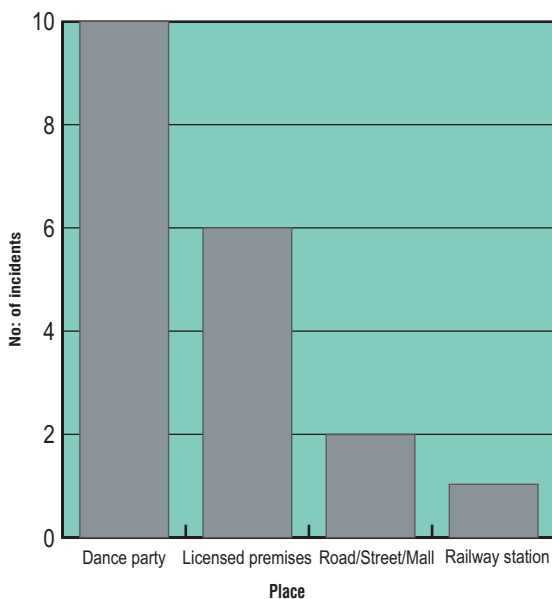
Figure 23 demonstrates that persons successfully prosecuted for supply were likely (11 of 19 incidents) to be carrying more than one drug.

The drug most commonly located on persons successfully prosecuted for supply was ecstasy, which was located in 84.2% (16 of 19) of incidents. This was followed by meth/amphetamine, which was located in 47.4% (9 of 19) of incidents.

Successful prosecutions for supply were only obtained in relation to ecstasy and meth/amphetamine.

It is interesting to note that whilst cannabis was the most common drug detected during the review period, it was ecstasy that led to the majority of successful supply prosecutions. As noted above (at paragraph 13.3.2), one factor that may have influenced the high rate of supply charges in relation to ecstasy is the fact that the traffickable quantity for ecstasy is relatively small (0.75 grams) when compared to other drugs such as meth/amphetamine, cocaine and heroin (3.0 grams).

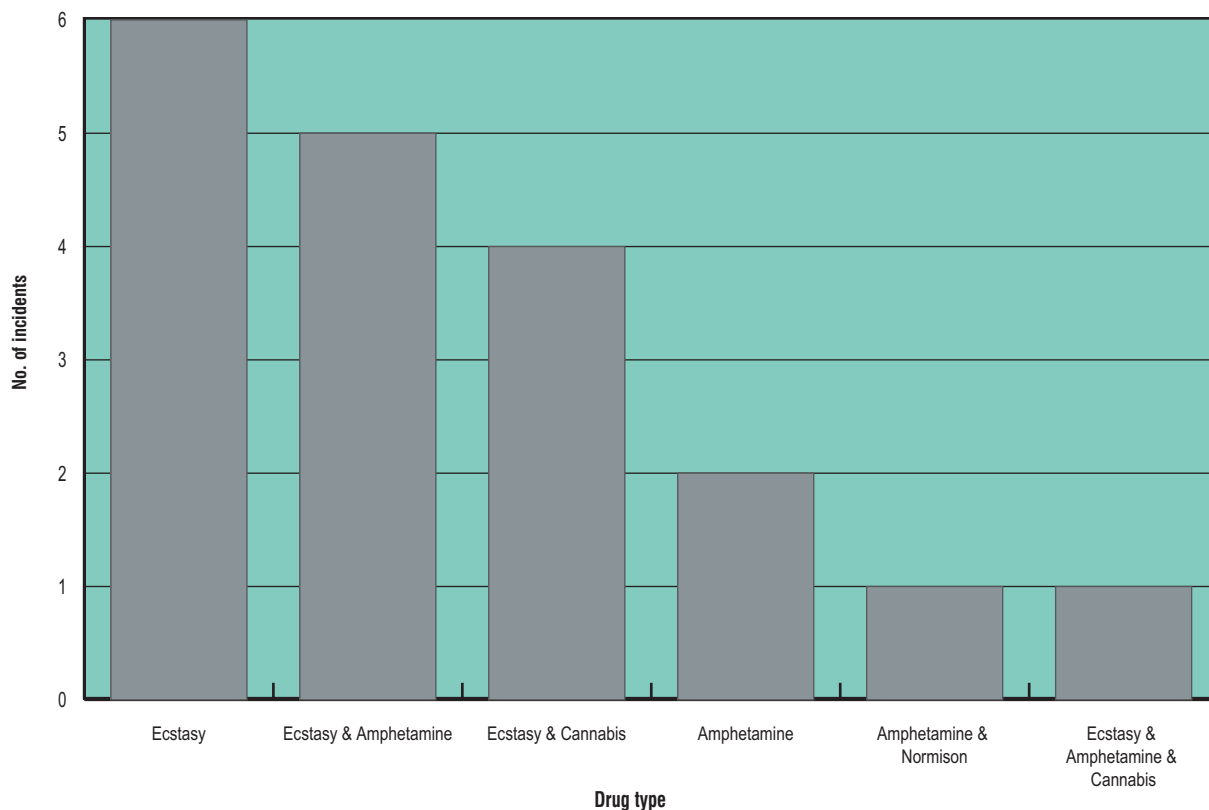
Figure 22. Places where drugs detected in proven supply cases



n=19

Source: Court transcripts and COPS.

Figure 23. Drug types located in proven supply cases



Source: Court transcripts and COPS.

n=19

One submission we received referred to the potential impact of the relatively small traffickable quantity for ecstasy in the following manner:

Some people found in possession of drugs may be charged with “deemed supply”, even though the drug is for their own personal use. This is because the traffickable quantity of some drugs is set by legislation at a very low amount which does not reflect the current reality of drug use patterns. For example, a person found with 3 tablets of ecstasy (an amount that one person might quite easily consume during a weekend) would be deemed to be in possession for the purpose of supply.⁸⁵⁴

The *Australian Trends in Ecstasy and Related Drug Markets 2004* study⁸⁵⁵ also noted that a majority (84% of the NSW sample) of regular ecstasy and related drug users used more than one ecstasy tablet in a typical session with a median usage of two tablets.⁸⁵⁶

13.5.4. Drug amounts involved in proven supply cases⁸⁵⁷

There is no doubt that some large seizures of drugs resulted from drug detection dog operations. Whilst no prescribed large commercial or commercial quantities were detected, there were a number of indictable quantities of ecstasy and meth/amphetamine seized.

In relation to ecstasy, the number of tablets seized ranged from 2.5 to 116 tablets. The median amount seized was 7 tablets, which is an indictable quantity of ecstasy (1.25 grams).⁸⁵⁸ The largest seizure of 116 tablets (23.6 grams net weight) is almost twenty times the indictable quantity, which attracts a maximum penalty of \$220,000 fine and/or 15 years imprisonment.⁸⁵⁹

In relation to meth/amphetamine, the weight of drug seized ranged from 0.2 to 31.3 grams. The median weight seized was 6.4 grams, which is greater than the prescribed indictable quantity (5.0 grams). The largest seizure of 31.3 grams is slightly more than six times the indictable quantity, which attracts a maximum penalty of \$220,000 fine and/or 15 years imprisonment.⁸⁶⁰

13.6. Penalties imposed on persons successfully prosecuted for supply

The penalties that were imposed upon persons successfully prosecuted for supply as a result of drug detection dog operations are listed in Table 22 below. The penalties are arranged from arguably the most serious (top) to least serious (bottom).

Table 22. Penalties imposed on persons successfully prosecuted for supply

Court outcome	Number of cases	Discussed below at paragraph
Imprisonment (to be served by way of periodic detection)		
24 months	1	
18 months	1	13.6.1
12 months	1	
Community service order		
450 hours	1	13.6.2
300 hours	2	
Suspended sentence (to be of good behaviour for sentence period)		
18 months	1	13.6.3
16 months	1	
Good behaviour bond (s.9)		
24 months	3*	13.6.4
18 months	1	
* In one matter a \$750 fine was also imposed in addition to the bond.		
Fine		
\$500	2	13.6.5
\$250	1	
Conditional discharge (without proceeding to a conviction) – to be of good behaviour for:		
24 months	1	13.6.6
12 months	3	
Total	19	

Source: Court transcripts and COPS.

Table 22 illustrates that persons successfully prosecuted for supply received a diverse range of penalties. There is little utility in generalising about the leniency, severity or otherwise of the penalties in isolation, or collectively, because the complex task of sentencing an offender is based upon an assessment of both objective and subjective factors referable to the offender and the nature of the offence committed.

Common law and statutory principles guide magistrates and judges in the sentencing task. Common law sentencing principles such as general and specific deterrence, retribution and rehabilitation are considered alongside the prescribed statutory purpose of sentencing, which is contained in section 3A of the *Crimes (Sentencing Procedure) Act 1999*:

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

In light of the caution urged above in relation to generalising, following is a description of the facts and circumstances that led to particular sentences being imposed. These descriptions reveal some common factors and issues that have arisen in relation to supply charges as noted by the courts.

In the majority of matters discussed below the drug amounts listed are net weights unless otherwise stated. As all of these matters involved the charge of supply, it was the usual course for the prosecution to obtain an analyst's certificate to confirm the drug type and weight given that penalties vary according to net weight and actual drug type.

In all but one case, the accused pleaded guilty.

13.6.1. Imprisonment

Imprisonment is a penalty of last resort as is made clear by section 5(1) of the *Crimes (Sentencing Procedure) Act*:

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

The offender who received the longest sentence of two years imprisonment (to be served by way of periodic detention) was a 19-year-old male who had no prior convictions. The offender was detected in licensed premises with 116 ecstasy tablets (the largest seizure during the review period and weighing 23.6 grams) and an indictable amount of meth/amphetamine (6.4 grams). The sentencing judge disclosed the sentencing dilemma that was faced where he said:

*The difficulties with the case in terms of sentencing are the fact that the prisoner has no prior criminal history at all, he has worked all his adult life. He was a gifted soccer player and only by chance did not play for Australia. He obviously is a person with a promising future in front of him. ... I would expect that he would never come to notice of the criminal justice system again.*⁸⁶¹

In relation to the offence itself, the judge made the following comments:

*I do not believe that this is a case where he [the offender] was trafficking for profit himself but it is certainly a case where he knew the person who supplied the ecstasy tablets, the people who asked him to get them knew that he could get the ecstasy tablets, and he volunteered to do it. ... He was certainly, at the very least, facilitating the supply of illegal drugs into the community and it was to a significant extent, not a minor extent. It is certainly nothing that could be said to be substantial as might be the word that might be used for commercial quantities of the drug, but it was a significant number of tablets.*⁸⁶²

The judge made reference to the fact that in this case the offender obtained the drugs for the purpose of distributing it to friends, but the judge did not view this as lessening the offence of supply because:

*he [the offender] obviously knew that the supplier ... was going to make a profit out of the distribution of these tablets, so he was assisting [the] dealer in making a profit.*⁸⁶³

The sentencing approach adopted by the judge is highlighted by the following passage:

*The matter then comes to be determined as to the sentence on the basis of what is an appropriate sentence to express the principles of general deterrence. It is an unusual case in many ways. It is certainly not the usual case in dealing in drugs. The authorities clearly establish that a substantial dealing in trafficking in drugs must result in a prison sentence except in the most exceptional circumstances. In my view there should be a statement made in respect of sentence here that reflects principles of general deterrence and I believe the appropriate course to take is to do that by way of periodic detention.*⁸⁶⁴

In the second matter which resulted in imprisonment, the offender who received 18 months imprisonment (to be served by way of periodic detection), was a 20-year-old male who had prior non drug-related convictions (offensive language, hinder and assault police). The offender was detected in licensed premises with 26 ecstasy tablets (4.8 grams) and an indictable amount of meth/amphetamine (7.62 grams). A psychologist's report was tendered to the court, which described the offender as a 'gratuitous supplier' insofar as he was in a position to provide drugs gratuitously if so requested by friends. The judge did not make any finding in regard to the type of supplier the offender was, except to say:

*As to what he was proposing to do with the drugs, I simply deal with him on the basis of deemed supply.*⁸⁶⁵

In deciding not to impose a full-time custodial sentence the judge made the following observations:

*There are plenty of authorities which one can refer to which deal with the question of young men and full-time custody. In my opinion it would be a disaster to send him to full-time custody and the Crown does not submit that full-time custody is inevitable. He would be a much worse person after that procedure than before ...*⁸⁶⁶

The third offender received one-year imprisonment (to be served by way of periodic detection). He was a 19-year-old male who had no prior convictions. The offender was detected in licensed premises with 30 meth/amphetamine tablets (10.3 grams) and 20 ecstasy tablets (5.5 grams). Both of these are indictable amounts. The judge made the following remarks when sentencing the offender:

*there would seem to be no reason why he [the offender] cannot get his life in order. I am prepared to give him an opportunity by reason of his youth, his prior good character, and his good prospects of rehabilitation.*⁸⁶⁷

13.6.2. Community service order

A community service order is a common alternative to imposing a full-time custodial sentence that requires the offender to undertake supervised unpaid work in the community for a specified number of hours.

The offender who received the longest community service order of 450 hours was a 24-year-old male who had prior drug-related convictions. The offender was detected in a mall well-known for drug dealing activity with 31.3 grams of meth/amphetamine and some sleeping tablets. The evidence before the court was that the offender had purchased the meth/amphetamine to assist him lose weight and to help him stay awake for weekend work commitments. The offender made admissions to the effect that if friends asked him for drugs, he would freely give them some and it was on this basis that he pleaded guilty to supply. The judge accepted that there was no evidence to indicate that the offender was involved in a profit making venture.

The judge acknowledged that 'the obvious starting point for such an offence is a custodial sentence'.⁸⁶⁸ However, the offender was given sentence discounts based upon his remorse, the utilitarian value of his early plea of guilty, and on the basis of assistance he provided to law enforcement authorities.⁸⁶⁹

One offender who received a 300-hour community service order was an 18-year-old male with no prior convictions. The offender was detected at a railway station whilst on his way to a dance party with 40 meth/amphetamine tablets, which the offender believed were ecstasy. The evidence before the court was that the offender procured, and was carrying the tablets for his friends for use at the dance party. In relation to sentencing, the judge made the following remarks:

The authorities say that those who supply drugs on an ongoing basis must expect a sentence of full-time custody. This is not a supply on an ongoing basis, but a one off incident, where ... the offender was the one chosen by his friends to buy drugs in bulk and supply them. This is not case of the offender going to a party and approaching strangers. All he was doing was supplying drugs to those of his friends who had pre-ordered them. This is not to minimise the seriousness of it, but to recognise that it is not as serious as if the offender had gone prepared to sell the drugs to strangers.

I am not satisfied that a custodial sentence is required in this matter. Although this is a serious offence, and there is a need to impose a sentence which reflects general deterrence, it must be recognised that these were unusual circumstances. The offender was very young and ... naïve. It is inappropriate that a sentence reflecting a substantial component of general deterrence be imposed on him.

*The sentence I will impose is designed to contain a measure of general deterrence, a measure of personal deterrence, and also designed to aid in the offender's rehabilitation. Through completing the order ... he has the ability to give something back to the community.*⁸⁷⁰

The second offender who received a 300-hour community service order was a 27-year-old male who had a previous non drug-related conviction (high range drink driving). The offender was detected in licensed premises with 8 ecstasy tablets (1.96 grams). The evidence before the court was that the offender made admissions that the tablets were

for himself and his friends. On that basis he pleaded guilty to supply because it was his intention to sell them to his friends at the cost he bought them for. The judge did not consider that a custodial sentence was warranted and said:

*The appropriate thing, I think, is a community service order which is the mark of the seriousness of the offence so that if he did commit any further similar offence then the next time he certainly would be looking at going to gaol.*⁸⁷¹

13.6.3. Suspended sentence

A sentence of imprisonment may be suspended where the offender enters into a bond to be of good behaviour for the period of the sentence. If the bond is breached then the suspension may be revoked and the original sentence imposed.

The offender who received the longest suspended sentence of 18 months was a 22-year-old male who had prior drug-related convictions. The offender was detected in licensed premises with 24 ecstasy tablets (5.41 grams). It appears that the judge was persuaded to suspend the sentence on the basis that the offender was working full-time and had a good work record. The judge also made the following observation in relation to the offence:

*I note that the totality of the drug was modest and I also note that he was selling it for personal gain in the sense that it was feeding his own habit. There is no suggestion that that he was selling it in a big way.*⁸⁷²

A 27-year-old male with no prior convictions received a 16-month suspended sentence. The offender was detected at a dance party with 46 ecstasy tablets (13.6 grams). The evidence was that the offender had procured the ecstasy in bulk for himself and some friends using money that was provided to him by his friends. The judge made some poignant comments regarding the extended definition of supply in the *Drug Misuse and Trafficking Act*:

Unfortunately, there is very little in the way of publicity amongst people who adopt the procedures to obtain recreational drugs that were adopted on this occasion to inform them that by doing something like that by virtue of the definition of supply in the Drug Misuse and Trafficking Act they become guilty of the offence of supplying a prohibited drug, because whether you are making any money out of the situation or not does not matter, you commit the offence of supply by giving it to someone else. Whether that is in return for money or not does not really matter.

So it is regrettable that more publicity is not given to the fact that collecting drugs for distribution at a party or wherever by one person for others constitutes a supply of that prohibited drug with the consequences that it has. Why it is unfortunate is that most of the people who get caught in this way doing this sort of thing are usually people who have no prior convictions and are of good character which is the case here.

*I just wish again that the government would see fit to perhaps disseminate [information] where it can do most good, information in regard to the serious nature of supplying, and what supplying means in regard to drugs because many young people, as indeed [the offender] did, do not seem to see there is anything particularly wrong or serious about buying drugs for other people or other friends and then giving it to them.*⁸⁷³

13.6.4. Good behaviour bond

Good behaviour bonds are an alternative to a full-time custodial sentence. If an offender breaches the bond then he or she may be re-sentenced for the offence for which they were originally convicted.

One offender who received a two-year good behaviour bond was a 19-year-old male with no prior convictions. The offender was detected at a railway station whilst on his way to a dance party with 9.5 ecstasy tablets (3.34 grams). The offender made admissions that the ecstasy was for both himself and his friends, and on this basis was charged with supply. During the sentencing hearing the issue of carrying drugs for friends came up:

Counsel for the offender: As I've indicated, he's been brutally honest, so much so that it's been to his own detriment. Had he been a seasoned criminal he could have simply said that the tablets in question were for his own use and not for the use of any other person, and hence avoid this more serious offence of supply rather than possess.

*Her Honour: Well yes, he wouldn't be in this situation if he wasn't carrying the larger amount of drugs. If he only had his own supply of Ecstasy, then he would be in a possess situation.*⁸⁷⁴

When imposing sentence the judge made the following observations:

The supply of a prohibited drug is always a serious criminal matter, however on a scale of seriousness, this matter is well towards the bottom. I do not regard the isolated supply of nine and a half ecstasy tablets as

*trafficking in any substantial degree as referred to in the oft cited case of The Queen v Clark. In such a situation [trafficking in a substantial degree] a custodial sentence is almost always warranted.*⁸⁷⁵

The second offender who received a two-year good behaviour bond was a 20-year-old male with no prior convictions. The offender was detected at a dance party with 15 ecstasy tablets (5.95 grams). The offender made admissions that he intended to take three tablets himself and share the rest with his friends. The judge decided to give the offender a bond based on the fact that he is in constant employment and in the judge's view: 'is doing the community some good by being so employed'.⁸⁷⁶ The judge had some salutary words for the offender after imposing sentence:

*Don't come back here again. There is nothing recreational about drugs when you are sitting in the dock.*⁸⁷⁷

The third offender who received a two-year good behaviour bond was a 21-year-old male with no prior convictions. In addition to the bond the offender also received a \$750 fine in relation to the supply charge. The offender was detected at a dance party with three ecstasy tablets (0.77 grams net weight), and small amounts of meth/amphetamine (0.6 grams gross weight) and cannabis (2.2 grams gross weight).

Another offender received an 18-month good behaviour bond and was a 34-year-old male with previous drug-related convictions. The offender was detected on a road (in his car) with four ecstasy tablets (0.81 grams) and a small quantity of cannabis (15.4 grams). The cannabis was packaged in 17 small resealable bags. The offender's defence counsel submitted the following in relation to the guilty plea:

The plea of guilty was entered on the basis only upon my client receiving some advice ... that he would be guilty of having the drugs in his possession for the purposes of distributing those to his friends.

*His friends all gave him money towards the drugs, he just happened to be the one who went and purchased them, but it was certainly on behalf of himself and his friends that he did that. He didn't know that that technically could be a supply, he had no idea.*⁸⁷⁸

13.6.5. Fine

One offender who received a \$500 fine was a 36-year-old female with no prior convictions. The offender was detected at a dance party with two and a half ecstasy tablets (1.2 grams gross weight). The offender made admissions that she intended to share the ecstasy with a friend and it was on this basis that the offender was charged and convicted of supply.

The second offender who received a \$500 fine was a 32-year-old male with no known prior convictions. The offender was detected at a dance party with three ecstasy tablets (1.0 gram gross weight). The offender was a British tourist who had only been in the country for a week when apprehended by police. The hearing of the charge occurred on the day that the offender was due to leave the country. It appears that the offender pleaded guilty to supply so as to finalise the matter and have his passport returned so he could board his return flight that evening. The magistrate made the following comments in respect to the deeming provision:

*I am sure [defence counsel] has been at some pains to point out what we call the deeming provisions so far as this substance is concerned and certainly the acquisition of, or buying of these three tablets ... puts you up into the category of a supplier. One would have to say however that that the supply component is not as sinister as perhaps other drugs and other circumstances.*⁸⁷⁹

Another offender received a \$250 fine and was a 24-year-old male with no prior convictions. The offender was detected at a dance party with six ecstasy tablets (2.02 grams) and a small amount of cannabis (1.9 grams). The offender pleaded not guilty to supply arguing that he was a bailee in the sense that he had mere custody, as opposed to possession or control, of his girlfriend's three ecstasy tablets. The magistrate rejected the argument and found the offender guilty of supply based on the finding that it was the offender's intention to share the ecstasy tablets with his girlfriend. In relation to the supply the magistrate made the following remarks:

*On the one hand I accept that it's a technical supply. It's not the kind of supply that is wreaking great and grave havoc on the community, but it's a start.*⁸⁸⁰

The above offender appealed the severity of the sentence to the District Court arguing that no conviction should have been recorded pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999*. (See below at paragraph 13.6.6 for further details on section 10.) The appeal was dismissed. The judge noted that an accused who pleads not guilty is not eligible to sentence discounts for remorse, contrition or the utilitarian value that accompanies a guilty plea.⁸⁸¹

13.6.6. Dismissal of charge and conditional discharge (without proceeding to a conviction)

Section 10 of the *Crimes (Sentencing Procedure) Act* provides:

- (1) *Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:*
 - (a) *an order directing that the relevant charge be dismissed,*
 - (b) *an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,*
- ...
- (3) *In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:*
 - (a) *the person's character, antecedents, age, health and mental condition,*
 - (b) *the trivial nature of the offence,*
 - (c) *the extenuating circumstances in which the offence was committed,*
 - (d) *any other matter that the court thinks proper to consider.*

It is important to note a penalty under section 10 does not lead to a conviction being recorded on a person's criminal record. However, if a person given a bond under section 10(1)(b) breaches the bond, they may be re-sentenced for the offence and a conviction recorded.

Section 10 bonds are different to good behaviour bonds that were discussed above (at paragraph 13.6.4) insofar as section 9 good behaviour bonds are more serious and involve a conviction being recorded against the person.

The offender who received a 24-month section 10 bond was a 21-year-old male with no prior convictions. The offender was detected at a railway station whilst on his way to a dance party with four ecstasy tablets (2.6 grams gross weight) and a small quantity of cannabis (4.7 grams gross weight). The evidence before the court was that the offender made admissions that two ecstasy tablets were for himself and two were for a friend. Based on these admissions the offender was charged with supply. In relation to the decision to impose a section 10 bond the magistrate commented that:

These are not chances that are given lightly by the Court but taking into account your early plea of guilty, which demonstrates some remorse and responsibility and a re-thinking of your position, it might well be that you can easily turn yourself into a contributing member of the community without too much trouble.⁸⁸²

Another offender was given a 12-month section 10 bond and was a 17-year-old male with no prior convictions. The offender was detected at a railway station with 23 ecstasy tablets (6.0 grams) with a number of items that led police to believe that he was involved in the supply of ecstasy. The evidence before the court was that this young person had attention deficit hyperactivity disorder (ADHD). However, the children's court magistrate made the following observation in relation to the offender's ADHD:

It [ADHD] doesn't, however, cloud your moral compass so you would have known when you decided to get involved in obtaining Ecstasy that that was a wrong thing to do, that there were serious penalties, that sometimes people go to gaol for the supply of drugs and that you were stepping into waters that were clearly wrong so I can't see that because you have ADHD it makes it any less criminal than it does for a whole bunch of other people.⁸⁸³

The second offender given a 12-month section 10 bond was a 23-year-old female with no prior convictions. The offender was detected at a dance party with three ecstasy tablets (1.1 grams gross weight) and a small amount of meth/amphetamine (0.2 grams gross weight). The offender made admissions that the ecstasy tablets were for herself and a friend. Based on the admissions the offender was charged with supply. The magistrate commented on the illegal nature of recreational drug use and in imposing the section 10 bond made the following observations:

I accept ... that this is a matter where you've now had considerable time to reflect [on] the charging and coming to Court in itself is something that I am sure you would never want to repeat. You would acknowledge the error of your ways. It was a mistake and you're only a young person and it can also be put down ... to your youth and irresponsibility.⁸⁸⁴

The third offender given a 12-month section 10 bond was a 27-year-old male with no previous convictions. The offender was detected at a dance party with six ecstasy tablets (2.0 grams gross weight) and a small amount of cannabis (2.0 grams gross weight). The offender made admissions that he intended to share the tablets with his friends at a dance party. The offender stated the following to police:

My girlfriend and I were meeting up with four friends and we were going to have one each. I was carrying them for all of us, I was just trying to be the gentleman. It is just a dance party.⁸⁸⁵

In relation to the supply charge the offender was initially convicted and given a 12-month good behaviour bond. When imposing the sentence the magistrate made the following remark:

I take into account strongly the fact that you did not have these drugs for any commercial gain, otherwise I would be considering a term of imprisonment.⁸⁸⁶

The offender successfully appealed the severity of the sentence to the District Court. The evidence before the appeal court was that the conviction that he received would jeopardise his successful business activities in Australia (the offender was here on a Business visa) and prejudice his ability to further develop his business in the United States of America. The judge explained the rationale to allow the appeal and impose a 12-month section 10 bond in the following manner:

the supply of any form of drug is a serious matter and they are matters that normally are not dealt with by way of exercising a discretion not to record a conviction.

If the appellant has a conviction for supplying drugs, he certainly would not be allowed into the United States.

I am satisfied on the basis of the evidence that there are genuine reasons for him travelling to the United States and that there would be a significant detriment to him out of all proportion to the offence that he has committed if there is a conviction.

I also take into account the fact that the offence itself falls at the very bottom end of the scale of criminality. It appears to have been a silly lapse of judgment in respect of what is sometimes regarded by young people as a harmless preoccupation but which is illegal and which the courts regard as matters of significance. I am satisfied that it is highly unlikely that he will ever offend in this way again.⁸⁸⁷

13.7. Supplying to friends or partners

In 63.2% (12 of 19) proven supply cases the evidence was that the offender was supplying to friends or partners. One judge labelled this practice as a 'technical supply' to arguably distinguish supplying to friends or partners from the more traditional notion of supply which involves selling drugs for some commercial gain or advantage to customers with whom there is generally no relationship.

Of the 12 cases where the evidence was that the offender in possession of the drug for the purpose of giving, sharing, or distributing drugs procured at the request of a friend or partner, nine offenders (75%) were detected at or on their way to a dance party, two (16.7%) at licensed premises, and one offender (8.3%) was detected in his car.

In another two cases there was evidence that the offender would supply drugs to friends if they were requested to do so, although there was no evidence that at the time they were apprehended that was their immediate intention.

13.8. Judicial attitude to young adults charged with drug offences

A total of 38 young adults (age range 17 to 20 years) who were found with a traffickable quantity of at least one prohibited drug were successfully prosecuted for a drug offence (possess, supply, or in cases where more than one drug located, both possess and supply). Of the 38 successfully prosecuted for a drug offence, 63.2% (24 of 38) received a section 10 dismissal or bond.

The following judicial observations reveal some of the attitudes towards the young adults who received a section 10 dismissal or bond for a drug offence:

You cannot put an old head on young shoulders.⁸⁸⁸

There used to be a time ... when people didn't need illicit substances to enjoy themselves and they're only deluding themselves if they think they do in this day and age. I understand peer pressure and I understand the sort of mindset that brings itself to participation in this sort of conduct but it doesn't happen without [legal] consequences. ... Whilst I am prepared because of your youth and plea of guilty to accede to the [section 10] recommendation, never again can you walk into a courtroom, at least in the foreseeable future, and ask for similar dispensation.⁸⁸⁹

*You have been dealt with today very leniently. That's not saying that drug offences are trivial offences but in respect of you there are circumstances which I am of the view permit the Court to deal with you in this way. You won't get the benefit of a dismissal without a conviction in the future if you re-offend, particularly by way of drug offences, but any offence. You've played your trump card today.*⁸⁹⁰

*I accept that young people often make mistakes and as best they can courts are entitled to give them a second chance but in a reasonable expectation this will be the first and the last time that you appear before a court charged with an offence such as this.*⁸⁹¹

*In the scheme of things this is a relatively minor offence [possession of one ecstasy tablet], I wouldn't like to see it ruin the rest of your life as a conviction might.*⁸⁹²

*I will deal with you in the same way that I deal with all people who come before me for their first offence for a matter such as this [possession of small quantity of amphetamine]. I will dismiss this matter ... on the basis you have entered your plea at the first available opportunity and I am prepared to give you the opportunity to try and keep your record clean at this stage.*⁸⁹³

*all too frequently it's young men ... who are simply experimenting with that type of substance [ecstasy]. There's no room for experimentation with drugs. It's a crime.*⁸⁹⁴

13.9. Submissions – drug detection dogs and drug supply

We received a number of written submissions that addressed the issue of whether the use of drug detection dogs impacted on the behaviour of drug suppliers and their customers. A number of submissions used data presented in the discussion paper to arrive at their conclusions.⁸⁹⁵

The NSW Council for Civil Liberties noted that drug detection dogs only located traffickable quantities of drugs in 1% of indications, which was described as a 'miserable failure rate'.⁸⁹⁶ The Council concluded that:

*the dogs are basically ineffectual in carrying out their stated objective of helping police identify drug dealers.*⁸⁹⁷

The UTS Community Law Centre submission stated:

*the legislation fails to meet its objective of targeting the suppliers of drugs, with drug-detection dog operations targeting individual small-time users as opposed to dealers. Of the 1110 successful searches between 22 February 2002 to 21 February 2003, only three found heroin, which totalled a mere 1.7 grams. 940 searches on the other hand found cannabis, yet none of these finds were over [300] grams (the legislative threshold amount for a charge of dealing). Those found to have drugs in their possession were overwhelmingly drug users, not dealers, and were cautioned by the police.*⁸⁹⁸ [Footnotes omitted]

The Youth Justice Coalition submission made the following observations:

in light of [the] types of drugs and quantities found ... the capacity of the [Drug Dogs] Act to deliver the policy objectives of targeting drug supply is seriously in doubt.

Further, few of the persons found with deemed supply quantities were convicted of [a] supply offence in court.

*These figures clearly show that the implementation of the police powers under the [Drug Dogs] Act have failed to meet the policy objectives of targeting drug dealers.*⁸⁹⁹

Redfern Legal Centre questioned the use of drug detection dogs as an effective drug law enforcement strategy to detect suppliers:

*In our submission, as sniffer dog detection results lead primarily to the detection of small quantities of cannabis (see Figure 4 of the Ombudsman's Paper), this form of policing in terms of solving the 'drug problem' and eliminating harmful drugs from our streets is patently ineffective. On that basis the drug law enforcement strategy behind this method of surveillance focuses on small-time personal-use drug users rather than suppliers and dealers. Detecting, charging and penalising such people does not go any substantive way to reducing illicit drugs in the community. Police resources would be better spent on targeting dealers and suppliers, rather than small-time users.*⁹⁰⁰

Redfern Legal Centre also suggested that resources used for drug detection dog operations:

*should be re-allocated into operations which focus on the real criminals and public menaces in the drug trade – namely, dealers, traffickers, suppliers, manufacturers and importers. Targeting people in possession of cannabis for personal use while they go about their daily business is a waste of valuable police resources and serves only to further erode police-public relations and marginalise minority groups (youth, Indigenous people and the homeless) in the community.*⁹⁰¹

An Associate Professor from the University of Technology, Sydney Department of Chemistry, Materials and Forensic Science opined:

*the use of drug detection dogs target mostly innocent people, followed by those with illicit drugs in their possession, with suppliers a very poor last.*⁹⁰²

Ms Lee Rhiannon MLC expressed the view that:

*the use of sniffer dogs deliberately targets those people with small amounts of drugs in their possession, not suppliers.*⁹⁰³

The Hepatitis C Council of NSW believed that the use of drug detection dogs under the Drug Dogs Act:

*is far more likely to target small time users of drugs rather than the suppliers or dealers, on whom it is our understanding the NSW Police are encouraged to focus their attention.*⁹⁰⁴

The Hepatitis C Council of NSW also opined that the Drug Dogs Act did not effectively target, or have any substantial impact on drug supply.⁹⁰⁵

Tony Trimmingham of Family Drug Support stated that the strategy of using drug detection dogs was not succeeding in reducing the supply and demand for drugs in New South Wales.⁹⁰⁶

A submission from an umbrella lobby representing young dance party consumers stated:

*the [Drug Dogs Act] is ineffective in its aim to bust the 'Mr Bigs'. Focus should be on importers and major dealers.*⁹⁰⁷

In relation to the question of whether the use of drug detection dogs in public places was an effective and efficient method of policing the drug trade a range of views were received.

The Office of the Director of Public Prosecutions' submission on the question was forthright:

*No, it is not. There appears to be no evidence that the use is targeting anyone other than users of prohibited drugs, particularly cannabis and particularly small users. The low incidence of searches resulting in the detection of drugs does not appear to warrant the negative aspects of the legislation, particularly the privacy concerns, the distress and embarrassment it causes some persons searched, the animosity that is aroused towards the police and members of the public and the likely net effect being that the drugs are being traded elsewhere.*⁹⁰⁸

NSW Police on the other hand, took a broader view on the question of policing the drug trade:

*Police deploy drug detection dogs on the basis of relevant intelligence. While drug dogs react to the presence of the scent of illicit substances and cannot discriminate on the basis of the quantity of drug a person may be holding (and may even indicate where there is the presence of a residual scent when no actual drug is present) NSW Police ensures it chooses locations for operations using relevant intelligence. That is, while the dog itself is not specifically able to differentiate between the amount of drugs, police deploy the dogs in locations where they believe they can have the most impact on the drug trade and other related criminal and anti-social behaviour. The benefits of HVP [High Visibility Policing] operations for example, which include the use of drug dogs, in enhancing public amenity, reducing fear of crime and deterring drug supply and other crimes cannot be underestimated.*⁹⁰⁹

NSW Police also addressed the issue of detection of small amounts of drugs during drug detection dog operations in the following terms:

*Police are not able to ignore persons detected through drug dog indications as being in possession of even very small amounts of drugs. Use and possession of illegal drugs is criminal conduct. Police use discretion with regard to those persons found with small amounts of drugs and use diversionary options where available, such as cannabis cautions ...*⁹¹⁰

The NSW Police view is perhaps best encapsulated by the statement:

*Every drug detection, no matter how small, benefits the community by taking illegal drugs out of circulation.*⁹¹¹

The Police Association of NSW were of the view that using drug detection dogs in public places:

is an extremely effective and efficient method of policing the drug trade as the dogs are locating drugs on people who would probably avoid detection by any other form of policing. There are situations when detections and findings come with a 'No Arrest' result due to offenders sighting the dogs and dropping their drugs on the floor, hence preventing police from charging due to the lack of proof of "possession" by the offender. This occurs frequently during nightclub searches, but whilst it is disappointing for police to not get a lock-up result, it

is still an extremely successful result as police are able to take possession of the drugs, which are subsequently destroyed, hence cleaning that little quantity of drugs off the streets. Furthermore, suppliers are caught, users are providing information on suppliers and other crimes and any drugs taken off the streets is effective policing. The deterrent effect is overwhelmingly successful.⁹¹²

In relation to targeting drug supply, NSW Police stated:

The use of drug detection dogs in accordance with the [Drug Dogs] Act affects suppliers by assisting in creating an environment where drug suppliers become reluctant to supply to new people in certain places (such as clubs and train stations) and less prepared to use public rail transport to courier drugs. Consequently, the opportunity for users to purchase illegal drugs should be decreased and/or users deterred from purchasing drugs in some instances and from certain locations where dogs can be deployed (for example, licensed premises). While these effects would be difficult to measure, the [Drug Dogs] Act effectively decreases opportunity for illegal drug activity to take place, and consequently, should have an effect on decreasing the activity itself.⁹¹³

The Police Association of NSW put forward a similar view to NSW Police in relation to targeting supply:

It [a drug detection dog operation] has the desirable effect of reducing the amount of suppliers active at the street-level. Police Minister Mr Watkins has maintained that targeting even small-time users would disrupt drug dealers' trade. "The important part of drug detection using the drug dogs is it intercepts drug consumers and it affects drug sales."⁹¹⁴ [Footnotes omitted]

Police officers we interviewed acknowledged the difficulty in targeting supply during drug detection dog operations:

The dealers know that if they get caught with six pills or more then they're gonna get done for supply or deemed supply. So they're very smart and they have it [the drugs] stashed, they get a couple of bits at a time from the car or wherever. See like, it's rare that a dealer's going to carry it.⁹¹⁵

However, these police officers suggested that they were targeting supply by reducing demand:

you can't just target suppliers all the time you know. We're taking away their market so it's gonna affect them [the dealers] anyway. ... doing it from different levels, not just always from the top down, ... you need to target the users as well.⁹¹⁶

13.9.1. Impact on low-level street supply

We also received a number of views in relation to the impact of drug detection dog operations on low-level street supply.

The Police Association of NSW stated:

It is evident that the use of drug dogs greatly hinders and deters drug suppliers from selling on the streets. At Kings Cross, it is evident that the amount of drug suppliers drops significantly once a drug dog operation commences. This information is raised by Drug Unit Officers who are aware of known drug suppliers and their activities. This has the flow on effect of reducing other types of crimes in that location.⁹¹⁷

A member of the public made the following observations about drug detection dog operations in Kings Cross:

They [drug detection dogs] don't seem to disrupt any drug dealing in the Cross, for instance; they don't seem to scare off possible customers except for a short period of time; they don't seem to result in any medium or high level dealers being out of business; and with only twelve dogs on duty there really can't be a deterrent effect as everyone knows that if the dog has been in the suburb this hour it is unlikely to be back for weeks.⁹¹⁸

The Shop Front Youth Legal Centre was of the view that the Drug Dogs Act was undesirable because it targets drug users and the occasional low-level dealer instead of the higher-level suppliers. Their submission acknowledged:

the possibility that use of drug detection dogs may have had an impact on street level supply by discouraging users from purchasing drugs on the street and discouraging suppliers from loitering on the streets in possession of their product.⁹¹⁹

The NSW Users and AIDS Association also commented that:

Our research shows some displacement in the marketplace due to drug dog operations with some dealers reported to shift their operations to coincide with drug dog patrols.⁹²⁰

However, the Shopfront Youth Legal Centre was not able to state with certainty if the above impact was a direct result of the Drug Dogs Act and went on to make the following remarks:

Our observations suggest that the use of dogs has not had a substantial impact upon street dealing. The only noticeable change is that dealers are more likely to go out (or send out runners) without any drugs in their possession in order to solicit business, and then bring the customer back to private premises to supply the drugs. Anecdotal evidence suggests that the practice of supplying from cars has also increased.⁹²¹

The Shopfront Youth Legal Centre was also of the view that if drug detection dogs did lead to the apprehension of dealers, they were more likely to be 'unsophisticated low-level dealers'.⁹²²

It is possible that communities particularly affected by visible low-level street supply of drugs perceive drug detection dog operations as effectively targeting supply because operations may result in the disruption of dealers' trade. Superintendent David Darcy, who until recently was Commander at Kings Cross LAC, made the following observations in relation to community expectations of policing low-level street dealers:

following a successful raid on a high level heroin dealer and a large number of his [subordinate drug] runners, ... [where] large quantities of drugs and a very large amount of money was seized ... I spoke with a number of residents who complained bitterly about the resurgence of the presence of overt drug dealing on the streets. I informed the residents about the great arrests but they were not interested in the success and my own observation the drug dealers they were now observing were only small time user/suppliers of cannabis. The lesson I learned was that it was irrelevant to the community what drug was being sold, what made them feel unsafe was the overt nature of drug supplying.⁹²³

13.9.2. Role of drug detection dogs in drug law enforcement strategy

Finally, we received submissions on the role of drug detection dogs in the broader scheme of drug law enforcement.

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 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.⁹²⁴

However, a senior police officer from another area emphasised that there had been significant supply arrests using the drug detection 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.⁹²⁵

Another senior police officer we interviewed suggested that drug detection dog operations have flow-on benefits. The officer cited an example of drug trade being disrupted at a local hotel when drug detection dogs were in the area. According to the officer, intelligence received indicated that dealers at a local hotel left the premises when informed by mobile phone of the drug detection operation at a nearby railway station.⁹²⁶

Dr Alex Wodak, Director of the Alcohol and Drug Service at St Vincent's Hospital, Sydney had a different perspective on the role of drug law enforcement strategies generally. Dr Wodak suggested that a disproportionate amount of resources are channelled into policing activities aimed at restricting supply, perhaps at the expense of drug treatment programs, which have the potential to impact on demand. Dr Wodak made the following comments:

The other difficulty is that there is a lot of sympathy for using law enforcement supply reduction higher up in the chain, and I don't have a problem with that. The difficulty is when supply reduction is aimed at the bottom of the chain – and I realise there are political imperatives in this, but somehow the community's got to be educated and law enforcement's got to be educated that this is expensive, counter-productive, and not effective.⁹²⁷

A drug treatment doctor who works at a clinic in inner Sydney made similar comments:

I do think that there's a place for sniffer dogs but it's not for sniffing out individual little drug users. It should be for looking for what the police are really interested in and that's big dealers, large quantities, mixed drugs, precursor drugs and lots of other interesting and important things. But individual little people with a bit of cannabis in their backpack I think is just ludicrous and a waste of police resources.⁹²⁸

13.10. Intelligence information leading to supply charges

Police officers have expressed a diverse range of views on the intelligence value of information that they receive from persons detected with drugs during drug detection dog operations. For example, one officer put it in the following manner:

for us to target suppliers, we have to start somewhere. ... You've got to start at the bottom and work up. Well we can get information from those people we do arrest. Even if they are only users, you might get some decent information off them, as regards to the next level.⁹²⁹

Other officers were of a similar view in relation to collecting intelligence information from users that were detected during drug detection dog operations:⁹³⁰

It's our job to gather intel.

We can identify patterns if we question everyone.

Can't get the dealers if we didn't put together the intel.

However, some officers thought that intelligence information was not always available or useful in relation to small drug detections which accounted for the majority of detections:⁹³¹

I don't bother [trying to get intel] with small cannabis finds.

We are mostly only dealing with the little fish.

it's a waste of time as you can't follow it up. I mean how many guys with blue jeans and black tops in their 20s do you think are in [name of suburb]?

90% of the time you don't get a valid answer.

One senior police officer we interviewed made the following comments in relation to gathering intelligence information from offenders detected by drug detection dogs:

I don't know whether these punters that they're getting, ... for the dogs ... what the dogs are getting, I don't know what sort of serious offending they could actually put the police on to. I don't think they're going to be putting them onto anybody who's dealing in pounds or is involved with an organised criminal network. They'd probably give up, they may well give up another user if they were under any sort of pressure to do so. They may give up their supplier but they mightn't even know their supplier because they've simply scored in a hotel. And then again, what's the importance of that person in the overall scheme of things? So I don't know whether they have the opportunity to give up, if you like, too many serious criminals. And I don't know whether the police involved with those street detections have really got the opportunity to ask them either.⁹³²

A member of the public made the following comments in relation to police gathering intelligence information:

There seems to be almost no evidence that the use of drug dogs enhances police intelligence holdings leading to supply related arrests as most people aren't interrogated when a cannabis caution is issued. Recreational end-users generally won't know medium-level suppliers so there is not much useful information to be found. End-users in Kings Cross, for instance, generally purchase off a runner, they never see even the street-level dealer so cannot identify them. Based on the presence of the same street-level runners and dealers for years in the Cross it would seem that no decent information has ever been provided to the police ...⁹³³

We were not able to identify any supply charges that were a result of intelligence information gathered during drug detection dog operations. Nor were we informed of any specific instances of intelligence gained as a result of a drug detection dog indication which led to any significant police investigation.⁹³⁴

We asked NSW Police whether there was any evidence that demonstrated intelligence acquired as a result of drug detection dog operations led to supply charges.⁹³⁵ NSW Police provided the following response:

the information requested is not readily available from NSW Police systems and as such, NSW Police is unable to provide the information requested.⁹³⁶

13.11. Impact on drug markets

The nature and structure of illicit drug markets may impact on the ability of drug detection dog operations to target drug dealers and suppliers.

For example, research addressing issues related to the dynamics of illicit drug markets indicates that drug supply usually occurs in a relatively organised manner. Illicit drugs, with perhaps the exception of heroin and to a lesser extent cocaine, are usually purchased from regular or occasional sources such as friends or known dealers in private residences.

The *Australian Trends in Ecstasy and Related Drug Markets 2004* study,⁹³⁷ which was funded by the National Drug Law Enforcement Research Fund, focused on regular ecstasy and related drug (meth/amphetamine, cocaine, ketamine, GBH, LSD, MDA) users. The study highlights the fact that these users mostly obtained their drugs in private residences from friends, known dealers, acquaintances or workmates. Only occasionally did regular ecstasy and related drug users obtain their drugs in public at nightclubs, agreed locations, dance parties or pubs.⁹³⁸

This study also found that regular ecstasy and related drug users mostly *purchased* drugs in *private* locations and *used* them in dance-related *public* venues such as nightclubs, dance parties, raves, and pubs. This indicates that deploying drug detection dogs in public locations may not be effective in targeting supply because drug supply for this group of users is usually carried out in pre-arranged private locations. And whilst 86% of the NSW sample of regular ecstasy and related drug users thought that recent police activity directed towards them was stable or had increased, 85% of these users reported that police activity had not made it more difficult for them to obtain drugs.⁹³⁹

Another major Commonwealth funded study, *Drug Use Monitoring in Australia: 2004 Annual Report on Drug Use Among Police Detainees*,⁹⁴⁰ reported that:

*In the past 30 days 71 per cent of all detainees reported obtaining illicit drugs, in the majority of cases from a regular source with the dealer usually contacted first by mobile phone. The drugs were more likely to be purchased from a house or flat, although with heroin it was equally likely to have been purchased on the street.*⁹⁴¹

Similar patterns on the source of drug supply were reported in the *2004 National Drug Strategy Household Survey*:

In 2004, illicit drugs were almost always sourced from friends or acquaintances, with the exception of heroin which was mostly sourced from dealers ...

Seven out of every ten cannabis users (69.4%) obtained this drug from friends and acquaintances. This proportion was similar for meth/amphetamines (69.9%), cocaine (71.5%), and ecstasy users (72.1%).

*The majority of heroin users (63.5%) obtained their drug from dealers.*⁹⁴²

However, we note that there were no convictions in relation to supply of heroin as a result of drug detection dog operations during the review period.

13.12. Other strategies to target drug supply?

Arguably one of the weaknesses of operations utilising drug detection dogs to target supply is the fact that the dogs detect people at a static point in time and thus information regarding the activities of the person leading up to their apprehension and their intention may not be easily discerned.

One senior police officer we interviewed highlighted the issue with the following remarks:

*The problem that you have got with the drug dogs is that the drug dogs are walking up the street and smell the drugs, the drug dog can't tell you that that person is a supplier or a user and that's, if the intended legislation was to target the suppliers that's all well and good, but the resources and equipment we have to do that don't exist so it is a legislative failure, it is not a tactical policing failure because we can only use what we are given.*⁹⁴³

One submission we received argued that:

*Catching drug suppliers requires different policing and investigative techniques.*⁹⁴⁴

The submission noted that police utilised undercover surveillance and controlled operations to gather intelligence to support warrant applications to conduct drug detection dog operations. The submission stated:

*Old fashioned on-the-ground undercover policing successfully identified the dealers of prohibited drugs in these areas.*⁹⁴⁵

However, when the warrant to conduct the drug detection dog operation was executed, police did not identify any drug dealers insofar as no supply charges were preferred.⁹⁴⁶

The submission concluded:

*Given their inability to identify drug suppliers, the drug detection dogs are a complete waste of money. It would be better to spend those scarce resources on other more effective policing methods for identifying and pursuing suppliers, like traditional undercover controlled surveillance operations.*⁹⁴⁷

It is difficult to assess in isolation what is the most effective strategy to identify drug dealers. But questions of the most appropriate and effective method of apprehension of those persons becomes an issue for police. Perhaps what is required to target suppliers is a combination of policing strategies as suggested by a police officer we interviewed:

*So everything's good. Well, if we stick to one thing it's not gonna work. You need to keep everything.*⁹⁴⁸

13.13. Concluding remarks

The primary objective of the Drug Dogs Act is to identify and prosecute persons involved in the supply of prohibited drugs.

For the two-year review period we were only able to identify 141 events where a traffickable quantity of prohibited drug was located as a result of a drug detection dog indication. This represents 1.38% of all indications for the review period.

Our analysis of supply charges, prosecutions and penalties revealed that 19 persons were successfully prosecuted for supply as a result of drug detection dog operations conducted during the review period. These successful prosecutions represent 0.19% of all drug detection dog indications for the review period. If only indications where a drug was located are considered, the figure increases to 0.71%. Or put another way, more than 99% of drug detection dog indications did not result in a successful supply prosecution. On this measure it is clear that the Drug Dogs Act has failed to achieve its stated objective of identifying and prosecuting persons involved in the supply of prohibited drugs.

Our examination of those persons successfully prosecuted for supply revealed that they were mostly young, male, first-time offenders involved in the 'technical' supply of drugs to friends and partners. Penalties ranged from two years imprisonment (served by way of periodic detection) to no conviction being recorded against the first-time offender.

We received a number of views regarding the question of whether the Drug Dogs Act is apt in targeting drug supply. Some argued that low-level street supply was disrupted and that it was possible that there was a reduction in the demand for drugs due to the deterrent effect of drug detection dog operations. However, we are not aware of any solid evidence to support claims that drug detection dog operations are responsible for any sustained disruption of low-level street supply. Nor are we aware of any evidence that intelligence gathered during drug detection dog operations has led to the detection of suppliers during the review period.

NSW Police have informed us that they conduct drug detection operations on the basis of their intelligence holdings and consequently it is surprising that more persons were not identified and prosecuted for supply.

It is evident that NSW Police considers drug detection dogs to be a valuable asset in the detection of drug offences. However, the data overwhelmingly demonstrates that when persons are detected in possession of drugs, it is users rather than dealers that are being identified under the regime established by the Drug Dogs Act.

It may be that other policing strategies, such as covert and controlled operations, would be more effective in identifying drug dealers because a person's activities are under surveillance over a period of time rather than a mere static point in time, which is an inherent feature of drug detection dog operations.

Indeed it may be arguable that the dynamics of the illicit drug market, whereby drugs are usually purchased in private locations from known sources, tends toward the conclusion that drug detection dog operations are not apt at targeting dealers and suppliers.

Given the limited number of successful supply prosecutions as a result of drug detection dog operations, it is hard to disagree with the view of one senior police officer that we interviewed:

*if the intent of [the] legislation was to catch suppliers, the use of the dogs has been a failure, it is as simple as that.*⁹⁴⁹

Endnotes

- ⁸²¹ NSWPD, Legislative Council, 6 December 2001, p.19745.
- ⁸²² NSWPD, Legislative Council, 6 December 2001, pp.19745-6.
- ⁸²³ NSWPD, Legislative Council, 6 December 2001, p.19746.
- ⁸²⁴ NSWPD, Legislative Council, 6 December 2001, p.19746.
- ⁸²⁵ NSWPD, Legislative Council, 12 June 2002, p.2973.
- ⁸²⁶ NSWPD, Legislative Assembly, 6 December 2001, p.19879.
- ⁸²⁷ Correspondence from Ms Clover Moore MP, Member for Bligh, 4 December 2002.
- ⁸²⁸ NSWPD, Legislative Assembly, 6 December 2001, p.19879.
- ⁸²⁹ NSWPD, Legislative Assembly, 6 December 2001, p.19881.
- ⁸³⁰ This model is discussed in more detail in NSW Ombudsman, *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, at paragraphs 8.1 and 8.2.
- ⁸³¹ *Coles* [1984] 1 NSWLR 726; *R v Carey* (1990) 20 NSWLR 292.
- ⁸³² *Drug Misuse and Trafficking Act 1985*, s.4.
- ⁸³³ Correspondence from NSW Police, 1 April 2005.
- ⁸³⁴ Correspondence to NSW Police, 23 February 2005.
- ⁸³⁵ NSW Police provided details of 11 persons charged with supply as a result of the 'Big Day Out' operation on 26 January 2005, which was outside the review period. In ten of the eleven matters, the supply charges were withdrawn. In the eleventh matter, the supply charge was proven and the offender was given a \$1000 fine for supplying ecstasy to his girlfriend.
- ⁸³⁶ Correspondence from NSW Police, 1 April 2005.
- ⁸³⁷ COPS Event 13.1, Charge 13.1 and Charge 13.2.
- ⁸³⁸ COPS Event 13.2 and Charge 13.3.
- ⁸³⁹ *Police v Timothy Paul Driver* (Still LCM, Unreported, Burwood Local Court, 11 June 2004.)
- ⁸⁴⁰ COPS Event 13.3 and Charge 13.4.
- ⁸⁴¹ *Drug Misuse and Trafficking Act 1985*, s.10(1).
- ⁸⁴² *Drug Misuse and Trafficking Act 1985*, s.11(1).
- ⁸⁴³ *Drug Misuse and Trafficking Act 1985*, s.12(1).
- ⁸⁴⁴ *Poisons and Therapeutic Goods Act 1966*, s.16(1).
- ⁸⁴⁵ *Drug Misuse and Trafficking Act 1985*, s.25(1).
- ⁸⁴⁶ *Criminal Procedure Act 1986*, s.165.
- ⁸⁴⁷ Charge 13.5 and Charge 13.6.
- ⁸⁴⁸ See Chapter 6 'Overview of results' at paragraph 6.6.1 for more information in relation to this cannabis find.
- ⁸⁴⁹ See *Young Offenders Act 1997* and *Young Offenders Regulation 2004*.
- ⁸⁵⁰ Correspondence from NSW Police, 18 April 2005.
- ⁸⁵¹ A mention is a brief discussion of the matter in court to ascertain what needs to be done in advance of the hearing. The accused's legal representative and/or the accused are usually required to attend mentions.
- ⁸⁵² Office of the Director of Public Prosecutions submission, 4 August 2004.
- ⁸⁵³ We independently confirmed that a warrant was obtained to carry out the operation. However, when questioned about the warrant during court proceedings, the officer-in-charge gave evidence to the effect that he could not recall ever sighting it. We note that the magistrate awarded costs of \$2750 against NSW Police and described the non-production of the warrant as a 'lapse in procedures'.
- ⁸⁵⁴ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ⁸⁵⁵ Stafford J, Degenhardt L, Agaliotis M, Chanteloup F, Fischer J, Matthews A, Newman J, Proudfoot P, Stoové M & Weekley J, *Australian Trends in Ecstasy and Related Drug Markets 2004: Findings from the Party Drugs Initiative (PDI)*, Monograph No. 57, National Drug and Alcohol Research Centre (NDARC), (2005).
- ⁸⁵⁶ Stafford J, Degenhardt L, Agaliotis M, Chanteloup F, Fischer J, Matthews A, Newman J, Proudfoot P, Stoové M & Weekley J, *Australian Trends in Ecstasy and Related Drug Markets 2004: Findings from the Party Drugs Initiative (PDI)*, Monograph No. 57, National Drug and Alcohol Research Centre (NDARC), (2005), p.15 (Table 4).
- ⁸⁵⁷ Where possible we have used net weights. However, if net weight information was not available, then gross weight information contained in the COPS event was used.
- ⁸⁵⁸ Based on a rough estimate that each tablet weighs 0.25 grams. It is stressed that this is a rough estimate and should not be used as any form of guide as to how many tablets may amount to the prescribed traffickable quantity of ecstasy, which is expressed as a weight (0.75 grams) in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*.
- ⁸⁵⁹ *Drug Misuse and Trafficking Act 1985*, s.32(1)(g).
- ⁸⁶⁰ *Drug Misuse and Trafficking Act 1985*, s.32(1)(g).
- ⁸⁶¹ *R v Victor Manuel Fernandez* (Blanch CJ, Unreported, Sentence judgment, Sydney District Court, 20 November 2003).
- ⁸⁶² *R v Victor Manuel Fernandez* (Blanch CJ, Unreported, Sentence judgment, Sydney District Court, 20 November 2003).
- ⁸⁶³ *R v Victor Manuel Fernandez* (Blanch CJ, Unreported, Sentence judgment, Sydney District Court, 20 November 2003).
- ⁸⁶⁴ *R v Victor Manuel Fernandez* (Blanch CJ, Unreported, Sentence judgment, Sydney District Court, 20 November 2003).
- ⁸⁶⁵ *R v Michael George Brako* (O'Reilly DCJ, Unreported, Sentence judgment, Penrith District Court, 24 October 2003).
- ⁸⁶⁶ *R v Michael George Brako* (O'Reilly DCJ, Unreported, Sentence judgment, Penrith District Court, 24 October 2003)..
- ⁸⁶⁷ *R v Joel Gabriel Ryland* (Ellis DCJ, Unreported, Sentence judgment, Parramatta District Court, 22 June 2004).
- ⁸⁶⁸ *R v Kelly James Stratton* (Bellar DCJ, Unreported, Sentence judgment, Sydney District Court, 19 March 2004).
- ⁸⁶⁹ The discount available for assisting law enforcement authorities is known as the 'Ellis discount' and is now enshrined in s.23 of the *Crimes (Sentencing Procedure) Act 1999*.
- ⁸⁷⁰ *R v Stevie Daniel* (Berman DCJ, Unreported, Sentence judgment, Sydney District Court, 19 February 2004).
- ⁸⁷¹ *R v Brett Joseph Foster* (Blanch CJ, Unreported, Sentence judgment, Sydney District Court, 18 November 2002).
- ⁸⁷² *R v Daniel Clint Ryan* (Phelan DCJ, Unreported, Sentence judgment, Wollongong District Court, 19 March 2004).
- ⁸⁷³ *R v Nathan John Harrison* (Williams DCJ, Unreported, Sentence judgment, Sydney District Court, 22 October 2004).

- ⁸⁷⁴ *R v Russell Craig Harman* (Hock DCJ, Unreported, Proceedings on sentence, Sydney District Court, 5 November 2004).
- ⁸⁷⁵ *R v Russell Craig Harman* (Hock DCJ, Unreported, Sentence judgment, Sydney District Court, 5 November 2004).
- ⁸⁷⁶ *R v Samuel Roy Lockett* (Shadbolt DCJ, Unreported, Sentence judgment, Sydney District Court, 3 September 2004).
- ⁸⁷⁷ *R v Samuel Roy Lockett* (Shadbolt DCJ, Unreported, Sentence judgment, Sydney District Court, 3 September 2004).
- ⁸⁷⁸ *Police v Nafez Raad* (Huber LCM, Unreported, Downing Centre Local Court, 10 September 2003).
- ⁸⁷⁹ *Police v Lee Richard Kinder* (Price LCM, Unreported, Downing Centre Local Court, 23 December 2003).
- ⁸⁸⁰ *Police v Kin Wong* (Keogh LCM, Unreported, Burwood Local Court, 9 March 2004).
- ⁸⁸¹ *In the matter of the appeal of Kin Win Wong* (Blanch CJ, Unreported, Sydney District Court, 19 August 2004).
- ⁸⁸² *Police v [Offender 1]* (Syme LCM, Unreported, Downing Centre Local Court, 16 February 2004). The offender's name has not been used in accordance with the court's order that no conviction be recorded.
- ⁸⁸³ *Police v [A Young Person]* (Mulroney CCM, Unreported, Bidura Children's Court, 23 February 2004).
- ⁸⁸⁴ *Police v [Offender 2]* (Keogh LCM, Unreported, Burwood Local Court, 23 February 2004).
- ⁸⁸⁵ COPS Event 13.4.
- ⁸⁸⁶ *Police v [Offender 3]* (Cloran LCM, Unreported, Burwood Local Court, 16 February 2004).
- ⁸⁸⁷ *In the matter of the appeal of [Offender 3]* (Blanch CJ, Unreported, Sydney District Court, 15 March 2004).
- ⁸⁸⁸ *Police v [Offender 4]* (Moore LCM, Unreported, Burwood Local Court, 26 September 2002).
- ⁸⁸⁹ *Police v [Offender 5]* (Henson DCM, Unreported, Downing Centre Local Court, 12 January 2004).
- ⁸⁹⁰ *Police v [Offender 6]* (Mottley LCM, Unreported, Burwood Local Court, 8 March 2004).
- ⁸⁹¹ *Police v [Offender 7]* (Henson DCM, Unreported, Downing Centre Local Court, 15 July 2002).
- ⁸⁹² *Police v [Offender 8]* (Syme LCM, Unreported, Downing Centre Local Court, 29 July 2002).
- ⁸⁹³ *Police v [Offender 9]* (Staunton CM, Unreported, Downing Centre Local Court, 9 July 2002).
- ⁸⁹⁴ *DPP v [Offender 10]* (Mottley LCM, Unreported, Burwood Local Court, 18 August 2004).
- ⁸⁹⁵ NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, June 2004.
- ⁸⁹⁶ NSW Council for Civil Liberties submission, 19 August 2004. The 1% success rate was based on 41 drug amounts detected where a deemed supply charge could have been laid out of a total of 4078 indications.
- ⁸⁹⁷ NSW Council for Civil Liberties submission, 19 August 2004.
- ⁸⁹⁸ UTS Community Law Centre submission, 23 August 2004.
- ⁸⁹⁹ The Youth Justice Coalition submission, 20 August 2004.
- ⁹⁰⁰ Redfern Legal Centre submission, 20 August 2004.
- ⁹⁰¹ Redfern Legal Centre submission, 20 August 2004.
- ⁹⁰² Associate Professor Michael Dawson (Head, Department of Chemistry, Materials and Forensic Science, University of Technology, Sydney) submission, 2 August 2004.
- ⁹⁰³ Ms Lee Rhiannon MLC submission, 9 August 2004.
- ⁹⁰⁴ Hepatitis C Council of NSW submission, 12 August 2004.
- ⁹⁰⁵ Hepatitis C Council of NSW submission, 12 August 2004.
- ⁹⁰⁶ Tony Trimmingham, Family Drug Support submission, 6 August 2004.
- ⁹⁰⁷ Transmission Promotions Pty Ltd submission, 4 August 2004.
- ⁹⁰⁸ Office of the Director of Public Prosecutions submission, 4 August 2004.
- ⁹⁰⁹ Ministry for Police submission, 30 August 2004.
- ⁹¹⁰ Ministry for Police submission, 30 August 2004.
- ⁹¹¹ Ministry for Police submission, 30 August 2004.
- ⁹¹² Police Association of New South Wales submission, 19 August 2004.
- ⁹¹³ Ministry for Police submission, 30 August 2004.
- ⁹¹⁴ Police Association of New South Wales submission, 19 August 2004.
- ⁹¹⁵ Police Focus Group 1, July 2004.
- ⁹¹⁶ Police Focus Group 1, July 2004.
- ⁹¹⁷ Police Association of New South Wales submission, 19 August 2004.
- ⁹¹⁸ J. Ready submission, 22 July 2004.
- ⁹¹⁹ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ⁹²⁰ NSW Users and AIDS Association submission, 17 August 2004.
- ⁹²¹ NSW Users and AIDS Association submission, 17 August 2004.
- ⁹²² NSW Users and AIDS Association submission, 17 August 2004.
- ⁹²³ Darcy D, *The highs and lows of dealings with disorder – The Kings Cross experience*, Conference paper, date delivered unknown, p.5.
- ⁹²⁴ Interview with senior police officer, August 2002.
- ⁹²⁵ Interview with senior police officer, May 2003.
- ⁹²⁶ Interview with senior police officer, July 2004.
- ⁹²⁷ Dr Wodak interview, June 2004.
- ⁹²⁸ Dr Andrew Byrne telephone message, 1 July 2004.
- ⁹²⁹ Police Focus Group 1, July 2004.
- ⁹³⁰ Police Focus Group 4, May 2004.
- ⁹³¹ Police Focus Group 4, May 2004.
- ⁹³² Interview with senior police officer, March 2004.
- ⁹³³ J. Ready submission, 22 July 2004.

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- ⁹³⁴ A senior police officer we interviewed in July 2004 provided us with the address of a drug house (term used to describe a house where drugs are distributed and sold), which was apparently identified as a result of information gained during a drug dog operation. However, we viewed the intelligence holdings in relation to the address and could not find any evidence linking the intelligence information to a drug detection dog operation. Another senior police officer provided us with information in relation to the execution of a search warrant, which resulted in an individual being charged and convicted of supplying of an indictable quantity of ecstasy. The information in relation to the supplier was apparently gained during a drug detection dog operation. However, we were not able to independently verify this by viewing intelligence holdings in relation to the name or address of the convicted supplier.
- ⁹³⁵ Correspondence to NSW Police requesting further information, 23 February 2005.
- ⁹³⁶ Correspondence from NSW Police, 18 April 2005.
- ⁹³⁷ Stafford J, Degenhardt L, Agaliotis M, Chanteloup F, Fischer J, Matthews A, Newman J, Proudfoot P, Stoové M & Weekley J, *Australian Trends in Ecstasy and Related Drug Markets 2004: Findings from the Party Drugs Initiative (PDI)*, Monograph No. 57, National Drug and Alcohol Research Centre (NDARC), (2005).
- ⁹³⁸ Studies in other jurisdictions have noted similar trends. For example, see Deehan A & Saville E, 'Calculating the risk: recreational drug use amongst clubbers in South East England', Home Office RDS, (2003), where it was found that 75% of survey respondents reported that their usual source of drugs were friends or acquaintances. The authors commented that: '[t]he findings that most clubbers bring their own supplies of drugs suggest that strategies focusing on drug dealing in clubs would not be particularly useful.'
- ⁹³⁹ Stafford J, Degenhardt L, Agaliotis M, Chanteloup F, Fischer J, Matthews A, Newman J, Proudfoot P, Stoové M & Weekley J, *Australian Trends in Ecstasy and Related Drug Markets 2004: Findings from the Party Drugs Initiative (PDI)*, Monograph No. 57, National Drug and Alcohol Research Centre (NDARC), (2005), see Table 59, p.153.
- ⁹⁴⁰ Schulte C, Mouzos J & Makkai T, *Drug Use Monitoring in Australia: 2004 Annual Report on Drug Use Among Police Detainees*, Australian Institute of Criminology, (2005), pp.21-22.
- ⁹⁴¹ Schulte C, Mouzos J & Makkai T, *Drug Use Monitoring in Australia: 2004 Annual Report on Drug Use Among Police Detainees*, Australian Institute of Criminology, (2005), p.2.
- ⁹⁴² Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, Canberra, April 2005, p.41.
- ⁹⁴³ Interview with senior police officer, May 2004.
- ⁹⁴⁴ NSW Council for Civil Liberties submission, 19 August 2004.
- ⁹⁴⁵ NSW Council for Civil Liberties submission, 19 August 2004.
- ⁹⁴⁶ Our office has independently verified the veracity of assertions made in the submission.
- ⁹⁴⁷ NSW Council for Civil Liberties submission, 19 August 2004.
- ⁹⁴⁸ Police Focus Group 3, August 2004.
- ⁹⁴⁹ Interview with senior police officer, May 2004.

Chapter 14. Legal interpretation issues

This chapter outlines various legal issues that have arisen from the use of drug detection dogs by police. Also included is a discussion of ambiguities arising from certain provisions of the Drug Dogs Act.

14.1. Judicial consideration of the use of drug detection dogs

The use of drug detection dogs by police has received limited judicial consideration due in large part to the fact that the dogs usually detect persons in possession of small amounts of prohibited drugs in relatively uncontroversial circumstances.

The charges laid as a result of the detection of mainly small amounts of drugs are usually dealt with summarily at the Local Court where guilty pleas represent by far the most common outcome.

In order to test the lawfulness of the use of drug detection dogs in court, the person charged must plead not guilty. The risk of this strategy is the person may incur costly legal fees and a possible loss of sentence discounts⁹⁵⁰ if ultimately found guilty. By contrast, the most common outcome of pleading guilty to a summary drug offence is a fine. Most people charged with summary drug offences plead guilty.

The fact that only a small number of matters resulting from drug detection dog operations are contested in court means that the use of drug detection dogs by police remains largely unscrutinised by the judiciary.

During our observations of police utilising the powers contained in the Drug Dogs Act we noted that certain provisions appear to be open to differing interpretations. In some circumstances the interpretation issue presented difficulties for police attempting to implement the Drug Dogs Act in a manner that met both the objectives of the legislation and the letter of the law. In our view, any ambiguity with respect to the interpretation of the Drug Dogs Act should be eliminated.

As part of our review we briefed a senior counsel for expert legal advice on certain aspects of the Drug Dogs Act. Where appropriate these views are included in the discussion of the issue.

The following discussion of the legal interpretation issues is not intended to represent legal advice.

14.2. Do drug detection dogs ‘search’?

As discussed in Chapter 2 ‘Background’, the Drug Dogs Act was enacted following the decision in *Police v Darby*⁹⁵¹ where a magistrate held that the actions of a drug detection dog constituted an illegal search.

The facts of *Police v Darby* are as follows. Mr Darby was standing on a crowded footpath outside a nightclub in Oxford Street, Sydney in the early hours of 25 February 2001. ‘Rocky’, a trained drug detection dog, picked up the scent of a prohibited drug and led his handler to the source. Rocky placed his nose on Mr Darby’s pocket to indicate to his handler the presence of a prohibited drug. Mr Darby was then searched by two police officers who located 2.89 grams of methylamphetamine and 1.9 grams of cannabis leaf. Mr Darby was charged with two counts of possess prohibited drug.

The drug detection dog handler gave evidence that Rocky was trained to touch persons to indicate the source of the scent of prohibited drugs and that Rocky made contact with Mr Darby a number of times by ‘nudging’, ‘bunting’ and ‘ferreting’ his pocket. The magistrate held that Rocky’s actions in identifying Mr Darby as the source of the scent of a prohibited drug constituted an illegal search because Rocky’s actions, which included contact with Mr Darby’s pocket, occurred prior to police forming a reasonable suspicion that Mr Darby was in possession or control of a prohibited drug.

The magistrate then exercised the judicial discretion (contained in section 138 of the *Evidence Act 1995*) to exclude the evidence of prohibited drugs located on Mr Darby as a result of the illegal search by police. The two ‘possess prohibited drug’ charges were dismissed because there was no other evidence.

The magistrate made the following comments in relation to the exercise of the judicial discretion to exclude the evidence:

*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.*⁹⁵²

The 'breach of personal rights' that the magistrate referred to are contained in the *International Covenant of Civil and Political Rights* 1966, which has been ratified by Australia without reservation. Relevantly, Article 17 states:

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 or reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

The decision in *Police v Darby* was overturned on appeal to the NSW Supreme Court. In *DPP v Darby*⁹⁵³ O'Keefe J held that the magistrate had erred in law by determining that the actions of the drug detection dog Rocky amounted to a search. After referring to various dictionary definitions of the word 'search', O'Keefe J made the following observations:

*Relevantly the generally accepted connotation of search is that it involves looking carefully in order to find something that is hidden. When it relates to a person, it carries the implication of some physical intrusion onto the person (for example by patting down the clothing of such person) or into the clothing or body of the person the subject of the search.*⁹⁵⁴

O'Keefe J noted that in the United States of America the issue of what constitutes a search had been the subject of a number of cases as a result of the Fourth Amendment to the Constitution of the United States which protects the 'right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures'.⁹⁵⁵ O'Keefe J commented:

*even under such a constitutional safeguard, the actions of a sniffer dog in detecting the presence of drugs have been held not to constitute a search.*⁹⁵⁶

O'Keefe J also referred to a South Australian case⁹⁵⁷ which held that the actions of a drug detection dog in screening luggage did not amount to search.⁹⁵⁸

O'Keefe J further held that the magistrate had erred in exercising the judicial discretion to exclude the evidence of prohibited drugs located on Mr Darby because the exercise of the discretion was based on the erroneous view that the actions of the drug detection dog constituted an illegal search.

The decision of O'Keefe J in *DPP v Darby* was appealed to the NSW Court of Appeal. In *Darby v DPP*⁹⁵⁹ the majority⁹⁶⁰ held that none of the actions of the drug detection dog Rocky amounted to a search.⁹⁶¹ The majority made the following observations in relation to the question of whether the actions of Rocky could be characterised as a search:

*"Search", as the term is used in s 37(4) of the Drug Misuse and Trafficking Act, and when applied to a person, involves examining the person for the purpose of finding out whether any prohibited drugs are in his or her clothing or body. On the evidence, none of Rocky's actions were performed for this purpose. All his actions, in relation to the appellant were for the purpose of identifying to the police officers present which person in the crowd of people was the person who possessed the drug, the smell of which the dog had detected.*⁹⁶²

*Rocky had been trained, once he had picked up the scent of cannabis, to go towards the scent, and if it emanated from a particular person to put his nose on the clothing of that person at the place where the scent was coming from. This was done solely for the purpose of identifying the person possessing the drug, not for the purpose of searching. The dog was not looking for the drug. He knew where it was.*⁹⁶³

*... had Rocky not gone up to the appellant and ferreted "on the pocket", the police would not have known, for sure, which person had the drug which the dog had scented. There were so many people milling about the ferreting may have been needed as part of the identifying exercise. Rocky was merely completing the identification of the person who was in possession of the drug. By doing that the dog was not carrying out a search.*⁹⁶⁴

Giles JA, the dissenting judge, held that the particular actions of Rocky did constitute a search.⁹⁶⁵

It is important to recognise that Giles JA was not suggesting that the actions of a drug detection dog would amount to a search or trespass to the person in all circumstances:

*A police officer would have been entitled to walk in the vicinity of the appellant and, if he were able to smell cannabis leaf in the appellant's possession, form a reasonable suspicion sufficient to entitle him to search the appellant. He would not thereby commit trespass to the person. Treating a drug detection dog as an extension of the police officer, an aid to his olfactory senses, the position is unchanged. It matters not that the dog acts differently from the police officer in the way he detects and indicates, short of bunting and ferreting and putting his nose on a pocket, the presence of a substance, or that the dog acts under the encouragement of the police officer. There is still not a trespass to the person, and there is not a search. In my opinion, Rocky's sniffing in the vicinity of the appellant, indicating that there was a scent without putting his nose on it, was not a search.*⁹⁶⁶

But Giles JA noted that Rocky's actions transgressed what a police officer could lawfully do:

*If Rocky had done no more than place his nose on the appellant's pocket, it may be that there would have been only identification of a place for the police to search, and no search by the police through Rocky. But there was more. Rocky was pushing and ferreting at the appellant's pockets with his nose, and was pursuing the appellant in the manner earlier described with the appellant attempting to push him away. At this stage Rocky was doing what the police could not do without authority. If [the drug detection dog handler] had placed his hand on the appellant's pocket, had pushed against it, had ferreted at it although not getting his hand in it, and when the appellant moved away had followed him and done the same, it seems to me that his actions would correctly be described as searching for the contents of the pocket. He would have been doing the equivalent to, perhaps more than, what is sometimes known as a pat-down search. Rocky was similarly searching, and in my opinion on the facts of this case there was a search.*⁹⁶⁷

Given the findings that Rocky's actions constituted both a search and a battery, Giles JA held that the exclusion of the evidence of prohibited drugs and the dismissal of the charges in *Police v Darby* were not erroneous and should stand.⁹⁶⁸ However, the majority of the Court of Appeal decided to remit the *Darby* matter back to the Local Court so that it could be determined after a hearing of all the evidence.⁹⁶⁹

After considering the judgment of the Court of Appeal in *Darby v DPP*, the Director of Public Prosecutions withdrew all of the charges against Mr Darby.

It appears that the weight of judicial opinion favours the view that the actions of drug detection dogs do not constitute a search. Rather, drug detection dogs are engaged in a process of identification that police use as a tool to assist in the formation of a reasonable suspicion that a person is in possession or control of a prohibited drug.

14.3. Forming a reasonable suspicion

In the context of drug detection dog operations, the question as to the formation of reasonable suspicion arises whenever a dog indicates the scent of a prohibited drug on a person.

In order to lawfully stop, search and detain a person following a drug detection dog indication, police are required to form a reasonable suspicion that the person is in possession or control of a drug.

As the Drug Dogs Act does not confer any new stop, search and detain powers on police, police must rely on existing statutory powers to lawfully stop, search and detain a person following a drug detection dog indication.⁹⁷⁰

In relation to the detection of drug offences, police usually invoke the stop, search and detain power contained in section 37(4) of the *Drug Misuse and Trafficking 1985* which provides:

A member of the police force may stop, search and detain:

- (a) *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, or*
- (b) *any vehicle in which the member reasonably suspects there is any prohibited plant or prohibited drug which is, in contravention of this Act, in the possession or under the control of any person.*

This provision requires a police officer to *reasonably suspect* that a person is in possession or control of a prohibited plant or prohibited drug before the officer can lawfully stop, search and detain that person.

14.3.1. What is reasonable suspicion?

The courts have considered the concept of reasonable suspicion on a number of occasions. In *George v Rockett* the High Court of Australia said:

When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion or belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person....

*Suspicion, ... 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground the belief, yet some factual basis for the suspicion must be shown. ...*⁹⁷¹

In *R v Rondo*, Smart AJ,⁹⁷² after reviewing previous authorities on the requirement of reasonable suspicion, made the following observations in relation to section 357E of the *Crimes Act 1900* which also requires a member of the police force to *reasonably suspect* a state of affairs before their power to stop, search and detain is enlivened:

These propositions emerge:

- (a) *A reasonable suspicion involves less than a reasonable belief but more than a possibility. ... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*
- (b) *Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials that may be inadmissible as evidence. The materials must have some probative value.*
- (c) *What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest 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 of the surrounding circumstances.*⁹⁷³

Senior counsel we briefed described the requirement of reasonable suspicion in the following manner:

*What is required before a search of an individual can be undertaken is that a police officer forms a reasonable suspicion that a drug offence is being committed. Such a state of mind is a subjective one, in the sense that the particular police officer must form the relevant belief. But the belief must be a reasonable one. That is determined by an objective standard, and usually by a Court.*⁹⁷⁴

*In order for the belief to be a reasonable one, it must have a factual basis which relates to the facts confronting the police officer at the time. It cannot be arbitrary. The police officer must form the suspicion of the commission of a drug offence and not just have a belief that it is possible that the person may be committing a drug offence.*⁹⁷⁵

14.3.2. Formation of reasonable suspicion by a police officer

Elsewhere we have noted:

- 26% of all indications by drug detection dogs led to police locating drugs.⁹⁷⁶
- The rate of locating drugs varied from dog to dog, ranging from 7% to 56% of indications by individual dogs.⁹⁷⁷
- Six of the 17 dogs utilised during the review period had a rate of finding drugs higher than the overall average of 26%. However, a majority (11 of 17) of dogs had a rate of finding drugs lower than the overall average of 26%.⁹⁷⁸
- The rate of finding drugs varied according to the type of place and location at which the indication occurs. For example, at licensed premises 23% of indications resulted in the location of drugs, whereas 39% of indications at dance parties led to the location of drugs. Similarly, in Kuring Gai LAC, 19% of indications resulted in the location of drugs, whereas close to 37% of indications in Kings Cross LAC led to the location of drugs.⁹⁷⁹

A question that has been raised during the review is whether it is reasonable to suspect that a person is carrying drugs solely on the basis of a drug detection dog indication given that 74% of indications did not lead to police locating drugs.

The NSW Police Dog Unit provides the following advice to police officers involved in drug detection dog operations:

*A drug detection dog will indicate the presence of an illegal drug on a person by sitting next to that person. Once a drug detection dog indicates, Police have reasonable cause to search the indicated person.*⁹⁸⁰

During our observations of police conducting drug detection dog operations, we noted that police almost always carried out some form of search following an indication by a drug detection dog, which demonstrates that most police officers are of the view that a drug detection dog indication is sufficient for the formation of reasonable suspicion.

NSW Police confirmed this view in their submission where they noted:

An indication by a drug detection dog forms the basis for a reasonable suspicion in all circumstances.

*While it is not possible to determine with 100% accuracy, prior to a search, whether a person who is indicated by a drug detection dog will be found carrying illicit drugs or not, a dog indicating a person ... is enough to allow police to reasonably suspect that the person is carrying illicit drugs ...*⁹⁸¹

The Police Association of NSW expressed a similar view:

*Police dog handlers maintain that on all occasions, an indication by a drug detection dog is sufficient to raise reasonable suspicion ...*⁹⁸²

The Police Association cited the following reasons for the dog handlers' view that all drug detection dog indications are sufficient to form a reasonable suspicion:

1. *Of the total drug indications, drugs located plus residual admission (searched persons admit to prior drug usage or carriage) totals 80%. ... Of the remaining 20%, statistics rely on the comments made of persons searched. For any number of reasons, these people may prefer to lie about their usage or carriage of drugs. Drug [dog] handlers argue that the dogs are accurate in regard to their indications, well over 90% of the time.*
2. *It is evident to drug dog handlers, that the dogs screen many hundreds of people with no reaction. One must ask then, why a drug dog then suddenly reacts to a person. In light of the above statistics, the dogs' accuracy is beyond reproach.*
3. *Training methodology precludes any other reason for an indication other than carriage or recent use of drugs, therefore substantiating reasonable cause to search.*
4. *The dogs are not capable of discriminating for any reason they simply react to a previously learnt scent.*⁹⁸³

14.3.3. Accuracy of drug detection dogs and the formation of reasonable suspicion

We received a number of submissions suggesting that it is not reasonable to suspect that a person was carrying drugs merely or solely on the basis of an indication by a drug detection dog. All submissions referred to the accuracy data presented in the discussion paper,⁹⁸⁴ which revealed that during the first year of the Drug Dogs Act police located drugs in 27%⁹⁸⁵ of searches conducted after drug detection dog indications. Below is a sample of comments we received:

*is such suspicion reasonable if the sniffer dog indication has a failure rate of 73 per cent?*⁹⁸⁶

*Given the dismal accuracy of drug detection dogs ... it is not possible to claim that an identification by a sniffer dog is sufficient of itself to constitute reasonable suspicion that a person is in fact carrying prohibited drugs.*⁹⁸⁷

*On the strength of the statistics presented ... we believe that it is unreasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog. This practice permits a decision based on the response of the dog, rather than the formation of a 'reasonable suspicion' by the police officer. It is submitted that this is not consistent with the legal formation of the 'reasonable suspicion' threshold test.*⁹⁸⁸

*We submit that it is not reasonable to suspect a person is carrying a prohibited substance merely on the basis of a positive indication by one dog.*⁹⁸⁹

*Statistics cited in the Discussion Paper reveal that drug dog searches based on the reasonable suspicion are failing to record a drug possession offence three out of every four times. If speed cameras were getting it wrong three out of every four times there would be a public outcry and they would be removed.*⁹⁹⁰

*On statistics provided, it has to be conceded that every person the 'sniffer' dog reacts to, will not have consumed or had or have had in their possession any type of illegal drug. For this reason, Police must take into consideration the place and the circumstances in which the search of the person is to take place.*⁹⁹¹

*The Youth Justice Coalition is seriously concerned about the accuracy of drug detection dogs. If police locate drugs in approximately 27% of searches conducted as a result of drug dog indications it is our view that it is not reasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog.*⁹⁹²

Given that such a low percentage of drug dog indications result in drugs being found, we are of the view that an indication by a dog, without more, is insufficient to give rise to 'reasonable suspicion'.⁹⁹³

The data revealing that drugs were located in 27% of searches raises a serious argument as to why it might not be reasonable to form a suspicion solely on an indication by a drug dog.⁹⁹⁴

The question of what weight, if any, should be afforded to accuracy data in the formation of reasonable suspicion is not entirely clear. On the one hand it could be argued that because the formation of reasonable suspicion is referable to the facts and circumstances present at the time of an indication, global or overall accuracy data is not relevant to the formation of reasonable suspicion for each discrete indication. On the other hand, it could be argued that the accuracy rate is a relevant factor because it is an indicator of the effectiveness or reliability of the 'tool' which police are utilising in the formation of reasonable suspicion.

One submission we received stated:

While the ... law regarding "reasonable suspicion" does not and should not define that notion by way of a mathematical formula or percentage threshold, clearly a 27% 'hit' rate is well below what can be regarded as a reasonable basis upon which to suspect a person is carrying a prohibited substance.⁹⁹⁵

A Professor of Law has suggested that:

Reasonable suspicion by its very nature eludes precise quantification. It clearly demands a lesser probability than a "50 per cent + 1" balance of probabilities, the civil standard of proof in court. Given that any working concept must allow for a margin of error whilst at the same time serving as a bulwark against abuse of power, it seems reasonable to think of it as requiring a probability of somewhere between one-third and 4 in 10. An arithmetic ratio may not seem meaningful in any specific case, but it is extremely useful, indeed essential, when evaluating the cumulative patterns of thousands of individual decisions ...⁹⁹⁶

A further question that arises is the calculation of the accuracy rate. Namely, should the accuracy rate also include 'residual admitted' indications?

14.3.4. Accuracy rate of drug detection dogs and 'residual admitted' indications

NSW Police classify indications as 'residual admitted' where the person indicated by a drug detection dog makes an admission of previous 'drug contact' after a search in which no drugs are located on the person. Admissions of drug contact range from persons admitting to previous drug use (usually cannabis), to persons admitting that they have been around others who were using drugs (usually cannabis). Thus a residual admitted indication involves the inference that the drug detection dog indicated in response to a residual, or lingering, scent of a drug.⁹⁹⁷

In Chapter 6 'Overview of results', we noted that 59% (4456 of 7497) of persons who were searched with no drug located made some admission of drug contact to police. We also noted in Chapter 8 'Accuracy of drug detection dogs' that in 70%⁹⁹⁸ (7120 of 10,211) of all indications during the review period, police either located drugs, or a person made some admission of drug contact. Curiously, some admissions of drug contact involved drug use that dated back months or years. (See Table 18 'Explanation by persons admitting personal use regarding when drugs last used' in Chapter 11 'Obtaining information and how it is recorded and used' for further information on admissions of drug use.)

NSW Police and the Police Association of NSW suggested that the accuracy figure should include indications where admissions of drug contact were made.

NSW Police were of the view that:

The figure of 27%, when considered in isolation from the figure of 71% of incidents where police have either found a drug, or some kind of admission in relation to drug use was made by persons searched as a result of a drug dog indication, does not give an accurate representation of the accuracy of drug detection dogs. The second figure shows that a drug detection dog is able to indicate some presence of a drug in 71% of cases. Furthermore, this figure does not take into account the possibility that a person may have denied involvement with illegal drugs despite actually having recently used or possessed those drugs.⁹⁹⁹

The Police Association of NSW argued that it is 'extremely misleading' to suggest that the accuracy rate of the drug detection dogs is only 27%:

There is no doubt that when one views the total of drugs located and previous drug carriage or use of 80%¹⁰⁰⁰, a different view can be formed on 'hit' rates. Notwithstanding the remaining 20% being open to many variables as to why they denied use or carriage, this success rate is extremely high. As it is an offence to self-administer a prohibited drug, those searched who admit to usage, have brought themselves to the attention of police due to their illegal activity. There is a distinct difference between these people and so-called "innocent" people who may be searched.¹⁰⁰¹

The Police Association of NSW also argued that it is legitimate for police to take into account residual scents when forming a reasonable suspicion because:

*drug usage is an illegal activity and so if a person chooses to use a drug and then is detected by a drug dog, reasonable suspicion is formed for perfectly legitimate reasons. The extremely small percentage of persons searched due to their close proximity to someone else using drugs, is an acceptable level, bearing in mind that person's possible complicity or condoning drug use.*¹⁰⁰²

In relation to the issue of searching individuals who have had prior contact with cannabis either through their own use or being in the vicinity of another person's use, the Police Association of NSW stated:

*Firstly, police are not aware (other than through comments made by a person indicated by a dog), whether a person is carrying drugs or not until they are searched. As many people who are accused of an offence lie to police about their actions, police would never resort to relying on comments made as to whether they should proceed with a search. As the majority of persons who are not found to be in possession of drugs admit on their own volition that they have previously used or carried drugs, then any search is made as a result of that person's actions. If a person decides to commit an offence and as a result is searched by police, it is a totally acceptable course of action for police.*¹⁰⁰³

We also received a number of submissions questioning the usefulness of 'residual admitted' indications in relation to the formation of reasonable suspicion. The Redfern Legal Centre suggested that:

*The low 'hit' rate (27%) strongly indicates that police practice in forming a reasonable suspicion on the basis of positive indications by dogs is significantly influenced by 'residual' scents. It further suggests that a dog's positive indication may not, on its own, justify the forming of a reasonable suspicion.*¹⁰⁰⁴

The Shopfront Youth Legal Centre opined that:

*The fact that many people indicated by dogs admit to some recent "contact" with drugs does not alter our view. The fact is that almost three quarters of people indicated by dogs are not found to be in possession of prohibited drugs.*¹⁰⁰⁵

And one submission raised the issue of whether 'residual admitted' indications was indicative of any unlawful conduct:

*Given that the law does not, at this stage, suggest that contact with cannabis smoke is illegal, I feel that any further action regarding 'residual' scent would be inappropriate and illogical.*¹⁰⁰⁶

14.3.5. Requirements for the formation of reasonable suspicion

The foregoing discussion demonstrates that there are divergent views in relation to:

- The question of whether a drug detection dog indication is sufficient on its own to lead to the formation of a reasonable suspicion.
- The relevance of 'residual admitted' indications to the formation of reasonable suspicion.

14.3.5.1. Formation of a reasonable suspicion based solely on a drug detection dog indication

There has been little judicial consideration of the question of formation of reasonable suspicion based solely on a drug detection dog indication.

In *DPP v Darby O'Keefe J* made the following *obiter*¹⁰⁰⁷ observations:

*The formation of a reasonable suspicion may not depend upon personal observation or sensation. It may depend, for example, on information conveyed to a police officer from some other source. That source may be another police officer. That source may be a private citizen. That source may be a dog. **The reactions of the dog in such a case would be no more than a basis for the formation of a reasonable suspicion by the police officer.** It does not seem to me that there is any difference in principle between information conveyed to a police officer by a fellow police officer or a private citizen on the one hand, and information conveyed to the police officer by the reactions of a trained drug detection dog on the other.*¹⁰⁰⁸ [Emphasis added]

O'Keefe J's comments appear to suggest that a drug detection dog indication is one of a number of factors that can be taken into account when a police officer is required to form a reasonable suspicion.

In *Darby v DPP* Giles JA observed that:

*Depending on the circumstances, the actions of the drug detection dog short of a search could provide grounds for reasonable suspicion of possession of a prohibited substance. For example, if the suspect were the only person present other than the dog's handler, the dog's clear indications of the presence of the substance and no other likely source may leave no sensible alternative.*¹⁰⁰⁹

During the second reading speech of the Police Powers (Drug Detection Dogs) Bill 2001 the Attorney General, the Hon. Bob Debus MP, stated the following:

*Police will ... be able to carry out random use of drug detection dogs, which will lead to a search of a person if the dog indicates that the person is carrying prohibited drugs or plants.*¹⁰¹⁰

However, the Attorney General also acknowledged the requirement of reasonable suspicion before police can lawfully conduct a search:

*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.*¹⁰¹¹

We asked a senior counsel for his views on the question of whether a drug detection dog indication of itself provides a sufficient basis for a police officer to form a reasonable suspicion that the indicated person may be in possession or control of a prohibited drug. The senior counsel was of the following opinion:

*In my view, the fact that in the course of general drug detection activities, the dog has 'indicated' a person is clearly a relevant factor in providing a basis for the formation of reasonable suspicion. Of itself, and without any other fact being taken into account, it is not a sufficient factor to justify the formation of reasonable suspicion. That is because in the absence of the identification of any other fact, the indication alone which has a 26% chance of identifying the commission of a drug offence, is entirely arbitrary.*¹⁰¹²

That is, a police officer could not simply rely on a drug detection dog indication alone to form a reasonable suspicion required before a lawful search of a person can be undertaken. The senior counsel was of the opinion that:

other facts or matters must also be taken into account by a police officer in order to form a suspicion which would be held objectively to be reasonable. These may include but are not limited to:

- (a) the reliability (or success rate in the detection of drug offences) of the combination of the particular dog and handler;*
- (b) the location and time of the day or evening of the general drug detection activities;*
- (c) any observation by the police officer of the appearance, demeanour and behaviour of the individual who has been "indicated" by the dog, whether before or after the "indication";*
- (d) whether a section 8 [of the Drug Dogs Act] warrant has been obtained, noting that such a warrant necessarily requires "reasonable grounds for believing that the persons at any public place may include persons committing drug offences";*
- (e) any other intelligence material of a general or specific kind relating to drug offences, or anticipated or suspected drug offences, in the location at which the general drug detection activity is being undertaken.*¹⁰¹³

14.3.5.2. Relevance of 'residual admitted' indications to the formation of reasonable suspicion

A question that has been raised during the review is what relevance, if any, can be attached to admissions of drug contact in the formation of reasonable suspicion.

It is important to note the following in relation to the formation of reasonable suspicion and the legislative scheme established by the Drug Dogs Act:

- To lawfully stop, search and detain a person pursuant to section 37(4) of the *Drug Misuse and Trafficking Act*, a police officer must reasonably suspect that **a person is currently in possession or control of a prohibited drug.**
- Section 5 of the Drug Dogs Act authorises 'general drug detection' which is defined as the detection of prohibited drugs or plants **in the possession or control of a person.**
- Section 3 of the Drug Dogs Act defines a 'drug offence' as the **possession, control or supply by a person of any prohibited drug or prohibited plant** in contravention of the *Drug Misuse and Trafficking Act 1985*. The offence of self-administration of a prohibited drug¹⁰¹⁴ is not a 'drug offence' under the Drug Dogs Act.

It is clear that the formation of reasonable suspicion requires a police officer to reasonably suspect that a person is *currently* in possession or control of a prohibited drug. However, admissions of drug contact may involve *previous* drug possession in some cases (where an admission of prior drug use is made), and no possession in other cases (where the person was in the proximity of others using drugs). An admission of prior drug use could arguably lead to a charge of self-administration of a prohibited drug, but this is not a 'drug offence' under the Drug Dogs Act, nor is it evidence that the person making the admission is *currently* in possession or control of a prohibited drug.

The senior counsel we briefed was of the following opinion in relation to the relevance of admissions of drug contact after searches in which no drugs were located:

*That sometimes a dog detects the indications of [a] drug without a person actually in possession would not, of itself, negate the formation by a police officer of a reasonable suspicion which is itself well-founded. For example, if a police officer were to smell cannabis on a person that may well be one element in the formation by the officer of a sufficiently grounded reasonable suspicion. That the smell may exist even though the person was not committing a drug offence, does not mean that it is of no relevance to the formation of reasonable suspicion.*¹⁰¹⁵

*However, the fact that statistics may record that dogs when carrying out general drug detection activities, have a statistical frequency of detecting some form of previous drug contact could not on its own, be of any relevance to the formation of reasonable suspicion upon which to ground a lawful search. In fact, in my opinion, the contrary is the case, because those statistics taken broadly and on their own tend to suggest that in a very large percentage of cases no drug offence is being committed even though the dog has given an indication. In any event, general drug detection is carried out for determining the existence of the designated drug offences, not previous drug contact.*¹⁰¹⁶

14.3.5.3. Discussion

The formation of a reasonable suspicion to stop, search and detain a person requires a police officer to reasonably suspect that the person is *currently* in possession or control of a prohibited drug. However, it appears that drug detection dogs indicate both actual and residual scents of prohibited drugs, and in some cases make indications for no discernable reason. Simply relying on a drug detection dog indication alone is not in our view sufficient to form a reasonable suspicion that a person is *currently* in possession of a prohibited drug as required by section 37(4) of *Drug Misuse and Trafficking Act*. Police are required to take into account the drug detection dog indication plus other relevant factors including those outlined above (at paragraph 14.3.5.1).

Requiring police to take into account additional factors would not prevent police from carrying out effective drug detection dog operations. Indeed requiring police officers to exercise their professional judgment should result in police becoming more skilled at identifying persons who may be committing a drug offence. This in turn may lead to a reduction in the number of persons being searched who are not committing a drug offence.

It is possible that some police officers involved in drug detection dog operations currently undertake assessments of other factors outlined above. However, this was not reflected in our observations, nor is it reflected in current police procedures that direct police to conduct a search after all indications. COPS entries generally refer to the fact that the drug detection dog made an indication, suggesting that this was the sole foundation for their reasonable suspicion to stop, search and detain the person.

Recommendations

33. NSW Police develop guidelines setting out the factors that may be considered by a police officer when forming a reasonable suspicion to stop, search and detain a person during drug detection dog operations.
34. NSW Police require senior officers to outline and discuss the guidelines at briefings conducted before all drug detection dog operations.
35. NSW Police require police officers to systematically record on COPS all of the subjective and objective factors that led to the formation of reasonable suspicion to stop, search and detain a person.
36. NSW Police remove from guidelines the advice that police have reasonable suspicion to search a person based solely on a drug detection dog indication.

NSW Police indicated in principle support for recommendations 33 and 34 and advised that:

*NSW Police already has procedures and advice in place regarding stopping, searching and detaining persons within the Code of Practice for CRIME. While this relates to stop, search and detain incidents generally and not specifically to drug dog incidents, it is applicable to those incidents and can be incorporated into operational briefings.*¹⁰¹⁷

NSW Police supports recommendation 35 and advised that it is already in practice:

*The information sheet on recording of drug detection dog incidents currently advises that police should record on COPS all the reasons that police decided to stop and search a person for drugs following a drug detection dog indication.*¹⁰¹⁸

NSW Police advised that recommendation 36 is under consideration and provided the following information:

*The Dog Unit is currently reviewing its Drug Dog Detection Management Guidelines, replacing them with Guidelines for the Deployment of Police Dogs. The Dog Unit will review this recommendation in consultation with NSW Police Legal Services during the review of the Guidelines. It is of note however, that drug dogs are employed in areas where there is intelligence regarding illicit drugs. That is, drug dogs are deployed into an area where it is considered likely that persons in that area will be in possession of drugs. This is also another factor that would be taken into consideration by police when forming reasonable suspicion to search.*¹⁰¹⁹

14.3.6. Reliability of drug detection dogs

As discussed above (at paragraph 14.3.5.1), one factor police officers could consider in forming a reasonable suspicion, in addition to a drug detection dog indication, is the reliability of the particular dog and handler. Senior counsel was of the following opinion in regard to the requirement for police to be able to demonstrate the efficacy of drug detection dogs in locating drugs:

*The continuing collection of statistics is no doubt of assistance in evaluating the use of dogs, especially those that are related to particular geographic locations, and times of the day or evening.*¹⁰²⁰

*However, ... the global determination of the success rates of drug detection dogs is not, standing alone, sufficient to ground a valid reasonable suspicion. In my view the preferable course would be that statistics are collected in relation to particular dogs, and their handlers, together with the locations and times of operations, as a measure of success. This information ought be conveyed to those police officers participating in general drug detection activities, and who might be required to form a reasonable suspicion before searching a person.*¹⁰²¹

It appears that NSW Police do not routinely utilise accuracy data on each drug detection dog. In our view the collation of data on each drug detection dog is desirable because the data could then be used by the drug detection dog handler to evaluate the efficacy of the tool being used in the formation of reasonable suspicion. The data would also enable supervisors and handlers to identify strengths and weaknesses which would arguably lead to the more targeted training of drug detection dogs.

In addition, accuracy data for each dog at various locations and settings is clearly relevant to the question of formation of reasonable suspicion by the police officers. For example, we have noted (at paragraph 6.5) that searches following drug detection dog indications at or on public transport and licensed premises are less successful than searches carried out after indications on road/streets and dance parties.

Recommendations

37. NSW Police collate performance statistics on each individual drug detection dog and handler to assist in ongoing evaluation and training. The statistics should include variables such as time and location of each individual indication, and the result of any search carried out as a consequence of the indication.
38. NSW Police require dog handlers to make available performance statistics of individual dogs to police officers involved in drug detection dog operations. The statistics should highlight the rate of finding drugs at different locations and settings.

NSW Police indicated in principle support for recommendation 37 and advised that:

NSW Police conducts testing and accreditation on drug dogs on a regular basis. However, this is conducted in a controlled environment.

The Drug Dog teams undergo quarterly accreditations consisting of odour recognition for all drugs, operational searches and people screening. If a team does not meet the benchmark standard in this process they are

removed from operational duties and given remedial training until such time as they are performing to the required standard.

Weekly operational training scenarios are conducted to keep the dogs sound and identify any operational flaws that may become evident. All operational training is recorded and submitted to the Dog Unit training office for review. These records are retained by the Dog Unit for reference. Statistical data is produced each month and reviewed by training staff.

Handlers provide a form to LAC police at each operation, designed to capture a variety of information about the Drug Dog team. LAC police then complete the form and the information is recorded at the Dog Unit and reproduced when required.

However, NSW Police agrees to consider how some measurement of the dog and handler's accuracy and performance can be undertaken 'in the field' in addition to the accreditation and assessment already carried out by the Dog Unit.¹⁰²²

NSW Police does not support recommendation 38. Their response stated that:

NSW Police does not support the provision of statistics to police to assist them in forming a 'reasonable suspicion' to search. As noted above (in relation to recommendation 37) NSW Police removes dog teams from operational duty if they are not performing to required standards.

The provision of statistics on an individual dog's performance can be affected by many factors such as number of deployments during a particular period, number of persons screened, number of warrants attended, actual drugs that are present at the time of the search or screening, location/environment/time/day/weather and other factors. Definitive statistics on performance based upon 'rate of finding drugs' may not be a correct or true reflection of the performance of a particular police dog. Any statistics taken operationally are subjective due to a number of factors and therefore could not be solely relied upon as a true reflection of a dog and handler's performance.¹⁰²³

This is a matter that NSW Police may wish to seek further legal advice on.

14.3.7. Reasonable suspicion to search without a drug detection dog indication

When conducting drug detection dog operations a police officer may form a reasonable suspicion to lawfully stop, search and detain a person *prior* to the person being screened by a drug detection dog. For example, a police officer may form a reasonable suspicion based on a person's reaction to or avoidance of the dog.

The question of whether to stop, search and detain a person based on their reaction to or avoidance of the drug detection dog was addressed at a number of police briefings we attended. Senior police usually advised officers that they should be alert to other sources of reasonable suspicion and not give their sole attention to drug detection dog indications. Following are some examples of the kind of instructions that police officers received about forming reasonable suspicion without a drug detection dog indication:

If you form reasonable suspicion because of someone's reaction to the dog, that's up to you.¹⁰²⁴

Advised that if they see people leaving the plaza when the dog gets there to "turn them over" because they have reasonable cause.¹⁰²⁵

If a person sees the dog and 'bolts' this may give you reasonable suspicion under the Drug Misuse and Trafficking Act.¹⁰²⁶

At some police briefings senior police noted that officers did not have the power to detain a person for the purpose of screening. The following instruction is one such example:

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.¹⁰²⁷

In circumstances where police do form a reasonable suspicion based upon a person's reaction to or avoidance of the drug detection dog, then they may lawfully detain the person, and if necessary, utilise the drug detection dog in the search of the person as provided for in section 4(1) of the Drug Dogs Act:

If a police officer is authorised to search a person for the purpose of detecting a drug offence, the officer is entitled to use a dog for that purpose.

For example, a police officer may form a reasonable suspicion that a person is committing a drug offence before the drug detection dog has indicated that the person may be in possession or control of a prohibited drug. In these circumstances the officer could commence a search of the person. Alternatively, the officer could ask the dog handler

to screen the person, and if the dog gives no indication, let the person go without carrying out a physical search of the person.

Many police we have observed or spoken with during the course of the review expressed the view that a person's reaction to or attempted avoidance of the drug detection dog may give rise to the formation of a reasonable suspicion necessary to lawfully search a person. However, we note that police have the difficult task of discerning reactions based on fear of being apprehended for a drug offence on the one hand, and fearful or anxious reactions to dogs on the other hand.¹⁰²⁸ In these circumstances police are required to exercise their discretion and judgment to determine whether a person's behaviour is suspicious.

In some circumstances a person's behaviour may provide a clear indication that they are attempting to avoid the drug detection dog for fear of being apprehended by police for a drug offence. The following extract from a COPS event narrative provides a useful illustration:

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 detection 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.¹⁰²⁹

The defendant's bag was then searched and 31.3 grams of meth/amphetamine and some sleeping tablets were located. The defendant was charged and pleaded guilty to supply prohibited drug.

However, on other occasions, the basis for the police response to a person was less clear. For example, one observer noted the following incident during an 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 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.¹⁰³⁰

The boy was not searched by police.

On another occasion in Sydney's inner west a man was searched because of his reaction to the dog. Our observer noted the following:

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.¹⁰³¹

We received a number of submissions that addressed the issue of formation of reasonable suspicion based on a person's reaction to a drug detection dog.

NSW Police submitted that:

any reaction by the person of interest [POI] to police or the dog would constitute part of the 'factual basis' upon which an officer could form a reasonable suspicion.¹⁰³²

The Shopfront Youth Legal Centre urged caution in relation to the formation of reasonable suspicion based on a person's avoidance of the drug detection dog:

It is a matter of concern that a person's apparent avoidance of a sniffer dog can raise a "reasonable suspicion" in the mind of some police officers. In our view, this is similar to drawing an adverse inference against a suspect who chooses to exercise his or her right to silence.

Citizens have the right to go about their business free of arbitrary interference with their privacy. A person may attempt to avoid a sniffer dog for various reasons which have nothing to do with being in possession of a prohibited drug. It has been acknowledged that in the Discussion Paper that many people (particularly people from certain ethnic groups) are afraid of dogs. Others may wish to remove themselves from the vicinity of a drug detection dog because they are in a hurry and do not wish to be caught up (this would often be the case at railway stations, for example) or even because they object in principle to the idea of being "sniffed" by a police dog.

"Reasonable suspicion" must be based on something more substantial than simplistic "if you have nothing to hide you have nothing to fear" logic.¹⁰³³

The Office of the Director of Public Prosecutions was of the view:

In the absence of an indication by the dog it would not be reasonable, except in extreme circumstances of flight. There are many reasons why someone may "react" to a dog.¹⁰³⁴

Redfern Legal Centre addressed the issue from a broader perspective:

As recent events in Redfern have shown, people may have a negative reaction to police for a range of reasons not associated with criminal offences. Many young people in the Redfern Aboriginal community have experienced police participation in the removal of children from their families by welfare agencies and consequently fear and run from police.

There are also many people who suffer from mental health problems who may express exaggerated fear of authority figures and even fear dogs.

Therefore no adverse inference should be drawn against any person based solely on fear or avoidance of police or dogs.¹⁰³⁵

It is evident that police must exercise both their judgement and discretion when assessing whether a person's reaction to the dog is based on a genuine fear of the dog on the one hand, or a desire to avoid apprehension by police on the other hand. As with the formation of reasonable suspicion based solely on a drug detection dog indication, we note that in some circumstances a person's unwillingness to be screened by a drug detection dog, of itself and without more, may not justify the formation of a reasonable suspicion to search a person.

14.4. Trespass to the person

During the course of our review the issue of trespass to the person as a result of the actions of drug detection dogs and their handlers emerged in two cases arising out of operations that took place before the commencement of the Drug Dogs Act.

14.4.1. What is meant by trespass to the person?

In broad legal terms a trespass to the person occurs when there is any unwanted or unjustified interference with a person's body. Assault and battery are two forms of trespass to the person. The terms assault and battery are sometimes used interchangeably,¹⁰³⁶ however, there is an important distinction between assault and battery at common law. An assault is an act by which a person intentionally or recklessly causes another person to believe that imminent infliction of unlawful force is likely. A battery is an intentional or reckless act where actual infliction of unlawful force occurs. In the context of battery, the term 'unlawful force' denotes physical contact for which there is no lawful excuse or justification.

14.4.2. Trespass to the person before the Drug Dogs Act

Essentially the issue in relation to trespass to the person is that if a drug detection dog makes contact with the person who is being screened, then the contact may, depending on the circumstances and the point in time at which the contact occurs, constitute a battery with the result that any evidence obtained after the battery occurs may be excluded pursuant to the judicial discretion to exclude improperly or illegally obtained evidence.

14.4.2.1. The ‘Darby case’

As discussed above (at paragraph 14.2), the decision of the Local Court in *Police v Darby* not to admit evidence from a police search was based on a finding by the magistrate that the actions of the drug detection dog ‘Rocky’ constituted an illegal search because they occurred prior to police forming a reasonable suspicion that Mr Darby was in possession or control of a prohibited drug. The question of battery was not directly determined.

The issue of battery was also not directly determined in the appeal of that decision in *DPP v Darby*. However, O’Keefe J made the following *obiter* observations in relation to the question of whether the actions of Rocky could constitute an ‘assault’:

*acts that might constitute an indecent assault if perpetrated by one human being on another, may well be characterised quite differently if performed ... by a dog on a human. When a “crotch nuzzle” (as senior counsel for the defendant so delicately described the relevant actions of Rocky) is performed by a dog in relation to a human being, it may be no more than a conventional, friendly, social gesture with no hostile intent, and unlikely to constitute an assault – whether indecent or otherwise.*¹⁰³⁷

In *Darby v DPP*, an appeal from O’Keefe J’s decision, the majority (Ipp & McColl JJA) held that as the magistrate made no factual findings of assault or battery when the case was originally determined, they were not prepared to base their decision on the issue of battery.¹⁰³⁸ However, the majority noted that:

*there has never been an investigation or findings as to whether any identification of the appellant and the possible formation of reasonable suspicion preceded any possible illegal conduct of the police through the actions of Rocky.*¹⁰³⁹

The majority also made the following *obiter* comments in relation to the possibility of illegal conduct by police through the actions of Rocky:

*There are three possible findings that could be made in regard to the conduct of the dog. Firstly, the evidence is capable of establishing that the identification of the appellant as a person possessing prohibited drugs occurred before the dog touched the appellant. The second possible finding on the evidence is that that identification occurred as soon as the dog laid his nose on the outside of the appellant’s pocket, before any bunting or ferreting took place. The third possible finding is that the identification only occurred after some or all of the bunting and ferreting. Depending on which finding is made, different consequences may follow. Those consequences may relate both to s 37(4)(a) of the Drug Misuse and Trafficking Act and s 138 of the Evidence Act.*¹⁰⁴⁰

*For example, should the identification of the appellant have been completed prior to the commission of a battery, reasonable suspicion under s 37(4)(a) may have been formed immediately upon that identification. If the identification was complete before any assault or battery occurred, that – arguably – may prevent any subsequent search from being illegal (any assault or battery then, arguably, being unconnected to the search).*¹⁰⁴¹

*Other permutations of findings are open.*¹⁰⁴²

Giles JA, in a minority judgment, was of the view that for the purposes of section 37(4) of the *Drug Misuse and Trafficking Act*, a search involves the intrusion into the personal integrity of a person and thus it follows that any search of a person without lawful authority would amount to a trespass to the person.¹⁰⁴³ This view is consistent with the majority view insofar as his Honour was pointing out that contact must be lawfully authorised.

However, Giles JA differed to the majority in relation to the question of whether the magistrate made findings in relation to assault or battery in *Police v Darby*:

*If trespass was not implicit in the magistrate’s decision, it was so closely linked with the basis of her decision that it must be considered ...*¹⁰⁴⁴

Giles JA went on to cite Australian and English authorities on battery. In relation to common law battery three principles emerge from his Honour’s discussion.

First, as observed by Robert Goff LJ in an English case:

*The fundamental principle, plain and incontestable, is that every person’s body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. ... The breadth of the principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his Commentaries, ‘the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man’s person being sacred, and no other having to meddle with it, in any the slightest manner’.*¹⁰⁴⁵

Second, the High Court of Australia has held that:

*It has never, however, been the common law that actual hostility or hostile intent towards the person against whom force is intentionally applied is a necessary general ingredient of an unlawful battery. ... hostility or hostile intent may convert what would otherwise be unobjectionable as an ordinary incident of social intercourse into a battery at common law ... Apart from such cases, however, the absence of such hostility or hostile intent towards the person to whom the force is applied neither precludes the intentional application of force to the person of another from constituting a battery at common law ... nor, of itself, constitutes a justification or excuse for it.*¹⁰⁴⁶

Third, there are certain contacts that may be characterised as ‘the physical contacts of ordinary life’ which the law excuses on the basis that those who move through society impliedly consent to such contact.¹⁰⁴⁷

In the English case referred to by Giles JA, an example of a police officer touching a person to engage their attention was used to illustrate contact that, in certain circumstances, could be characterised as excusable contact. However, Giles JA distinguished the actions of Rocky from the example of excusable contact:

*the police were not attracting the appellant’s attention through Rocky. Nor was Rocky being walked and, as an exuberant dog might do, nuzzled a passing pedestrian in one of the “the physical contacts of ordinary life”. He was encouraged to do what he did. And what he did was more than placing his nose on the appellant’s pocket, ... and included the bunting or nudging to the appellant’s genital area. ... these attentions were unwelcome to the appellant, who moved away a number of times, kept pushing Rocky’s head away, said to get the dog away, and became agitated. Only after a number of Rocky’s attentions did [Rocky’s handler] move him away. In my opinion, what occurred was a battery.*¹⁰⁴⁸

As mentioned above (at paragraph 14.2), the Director of Public Prosecutions withdrew all charges against Mr Darby after the decision of the Court of Appeal in *DPP v Darby*.

14.4.2.2. The ‘Harris case’

Police v Harris is another pre Drug Dogs Act case where the actions of the drug detection dog were examined.¹⁰⁴⁹ The brief facts of *Police v Harris* are as follows. Mr Harris was sitting in a Bryon Bay café on the afternoon of 9 March 2001. ‘Thor’, a trained drug detection dog, approached the table where Mr Harris was sitting with some friends and went under the table before sitting down beside Mr Harris to indicate to his handler the presence of the scent of a prohibited drug to his handler. Police subsequently searched Mr Harris and located 26.1 grams of cannabis leaf in the pocket of Mr Harris’ jacket. Mr Harris was charged and convicted with possess prohibited drug.

Mr Harris appealed the conviction to the District Court. In *DPP v Harris* Black QC DCJ found that the evidence established that some drug detection dogs do come into contact with people and that on this occasion Thor ‘nuzzled’ Mr Harris in the groin and touched his jacket before police had formed a reasonable suspicion entitling them to search Mr Harris.¹⁰⁵⁰

Black QC DCJ made it clear that he was relying on the principles enunciated by Giles JA in *Darby v DPP*. According to the judge, the fact that Thor was a trained police dog under the control of the handler meant that it was not possible to argue that the physical contact between Thor and Mr Harris was in any way accidental. Black QC DCJ held that the contact between Thor and Mr Harris was not one of the ‘physical contacts of ordinary life’ and thus the contact was not lawfully justified in the circumstances.

Black QC DCJ found that the evidence was improperly obtained and exercised his judicial discretion to exclude it. His Honour made the following comments in relation to the exercise of the judicial discretion:

*It is very important that I should make this clear; in no way does this court condone the possession of unlawful drugs, be they cannabis or any other form of drug. ... I do not believe that the social stability of the area or indeed of any wider area, will be unduly threatened if on the particular facts in this case, I decline to exercise my discretion in favour of admitting the evidence.*¹⁰⁵¹

As the evidence of prohibited drugs was excluded, the appeal was successful and the conviction quashed.

14.4.3. Trespass to the person under the Drug Dogs Act

It is clear that the Parliament was cognisant of the potential for a trespass to the person to occur during drug detection dog operations. During the second reading speech of the Police Powers (Drug Detection Dogs) Bill 2001, the Attorney General, the Hon. Bob Debus MP said:

*One situation that the bill contemplates is where a drug detection dog touches a person whilst searching. This can render a search unlawful, because the trespass on the person is not justified at the time the dog touches the person. The police officer may not yet have formed a reasonable suspicion when the dog touches the person, but does so only after the touching. The touching is potentially an unjustified trespass and therefore unlawful.*¹⁰⁵²

It appears that the intention of Parliament was to lawfully excuse contact between the drug detection dog and the person being screened:

*The bill indicates that all reasonable precautions should be taken by a police officer conducting a general drug search to stop the dog from touching a person. This is in line with police protocols in the use of drug detection dogs and means that if a dog touches a person in a general drug search, despite the best efforts of the police officer handling the dog, then the touching of the dog does not constitute an unlawful search by the police officer. The safety of all persons involved and of the dog is best served if the dog cannot touch the suspect at all.*¹⁰⁵³

However, it is not entirely clear whether the provisions of the Drug Dogs Act excuse contact that may occur during 'general drug detection'.

Section 5 of the Drug Dogs Act provides:

*For the purposes of this Act, **general drug detection** is 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.*

Section 6 of the Drug Dogs Act provides:

A police officer is authorised to use a dog to carry out general drug detection, but only as provided by this Part.

Section 9 of the Drug Dogs Act provides:

- (1) *A police officer carrying out general drug detection under this Part is to take all reasonable precautions to prevent the dog touching a person.*
- (2) *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.*

The expressions 'take all reasonable precautions' and 'keep a dog under control' are not defined, and as far as we are aware, there has been no judicial consideration of these expressions. Thus two questions arise in relation to the requirements in section 9. First, what constitutes a failure to take all reasonable precautions to prevent the dog touching a person? Second, what are the legal consequences of the touching in circumstances where the requirements of section 9 have not been met?

14.4.3.1. Taking all reasonable precautions

One possible interpretation of the requirements in section 9 is that if a drug detection dog does make contact with the person being screened, then the handler has not taken *all* reasonable precautions to keep the dog from touching the person because if the handler had taken these precautions, no contact would have been made. This interpretation is unlikely given that section 9(1) uses the term 'reasonable', which arguably requires some inquiry into the circumstances of the touching. For example, it may not be reasonable to expect a dog to move through a crowded environment without some incidental or accidental contact occurring. Further, the Attorney General appears to have suggested that some contact would be excused where he said that despite the best efforts of the police officer handling the dog, the touching of the dog does not constitute an unlawful search by the police officer.

The question of what would constitute taking all reasonable precautions or employing best efforts to avoid touching is difficult to reconcile with the evidence given in the *Darby* case discussed above. In the *Darby* case there was evidence that the drug detection dog Rocky was trained to place his nose on the scent of the drug and then sit down to indicate the presence of the scent of a prohibited drug. Rocky's handler gave the following evidence in response to a question regarding information he relayed to other police officers at the briefing prior to the commencement of the operation:

*I briefly gave them an overview of his [Rocky's] training and the fact that the dog is trained to – that when he detects the scent of cannabis he sits and receives a food reward. ... I then explained to the officers at the briefing that in his indications he will indicate with his nose to me the scent of a drug. He will follow the scent. I will encourage the dog to follow the scent of the drug to the source. He is trained to put his nose on the source of the drug and sit down beside where the source is.*¹⁰⁵⁴

Clearly training and encouraging a drug detection dog to touch a person to indicate the presence of the scent of a prohibited drug would be incongruous with taking all reasonable precautions to prevent touching. We asked NSW Police if drug detection dogs are trained to place their nose on the source of the scent.¹⁰⁵⁵ In their response NSW Police did not directly address the question. However, NSW Police provided the following explanation in relation to possible contact between the drug detection dog and the person being screened:

During an operation, it is likely that a person of interest could move about while being spoken to, therefore the dog may also need to move and adjust his position for the 'sit'. During this period of adjustment the dog will continue to isolate the source of the illicit drug odour, at which time there may be some contact with the [person of interest] by the dog's nose at the source of the odour.¹⁰⁵⁶

14.4.3.2. Legal consequences of trespass

The further difficulty with the requirements in section 9 is the fact that the Drug Dogs Act does not prescribe what consequences result from a failure to either take all reasonable precautions to prevent touching or keep the dog under control.

Interestingly, the Drug Dogs Act does prescribe the consequences for certain other trespasses. For example, section 4(2) provides a general authority for police to use a drug detection dog:

A police officer is, for the purpose of detecting a drug offence, entitled to be accompanied by a dog under the officer's control if the officer is entitled to enter, or be in or on, particular premises in the exercise of the officer's functions.

Section 4(3) of the Drug Dogs Act broadly excuses any trespass to land whilst exercising the general authority to use a drug detection dog:

Neither the State nor a police officer is liable to any action, liability, claim or demand merely because a dog entered, or was in or on, premises as provided by subsection (2).

But section 4(3) does not appear to excuse trespass to the person whilst exercising the general authority to use a drug. That is, the mere presence of the dog is excused but arguably not its actions.

14.4.4. Is trespass to the person an issue under the Drug Dogs Act?

A solicitor writing about the *Harris* decision in the *Law Society Journal* made the following comments in relation to the question of battery under the Drug Dogs Act:

The [Harris] appeal considered the law before the commencement of the [Drug Dogs Act]. However, in a similar fact situation to Harris, any touching by a sniffer dog could amount to a battery, depending on the circumstances, with the same result of discretionary exclusion of evidence subsequently obtained. The [Drug Dogs Act] addresses the power of police to use dogs to assist in drug detection, but does not affect this point.

Arguably, the [Drug Dogs] Act may even reinforce the point that contact by a sniffer dog can constitute a battery because s 9 of the [Drug Dogs] Act requires police to take "all reasonable precautions" to avoid the sniffer dogs making contact with anybody.¹⁰⁵⁷

The NSW Attorney General's Department was of the view that:

The Parliament has expressed the view that it is undesirable that drug detection dogs touch a person during general drug detection having regard to section 9(1)&(2) of the [Drug Dogs] Act. However, it is unlikely that Parliament intended that a mere incidental touching by a dog in the course of general drug detection would invalidate the action or any subsequent search. The fact that general drug detection may be conducted in areas crowded with many people in close proximity adds force to this observation.¹⁰⁵⁸

Senior counsel we briefed was of the following view in relation to the question of whether contact that occurs during general drug detection constitutes a battery:

Whether a touching [during general drug detection prior to the formation of reasonable suspicion] would amount to a battery is not absolutely clear in the relevant provisions. It does seem to have been the intention of Parliament that the [Drug Dogs] Act authorises some touching by a dog as part of its role in indicating the presence of prohibited substances.¹⁰⁵⁹

Given the clear parliamentary intention, but ambiguous legislative provisions, it is our view that legislative amendment is preferable to clarify the situation where any slight or unintentional touching occurs during general drug detection. The NSW Attorney General's Department was of a similar view:

The legal status of incidental touching of persons by drug detection dogs may be amenable to legislative clarification. Any legislative clarification should not have the unintended consequence of condoning excessive actions of drug detection dogs and ensure that there are adequate safeguards, protections and remedies.¹⁰⁶⁰

Senior Counsel suggested that the following provision be inserted into section 4 of the Drug Dogs Act:

Providing the police officer complies with sub-sections 9(1) and 9(2), any touching of a person by a dog carrying out general drug detection:

(i) does not constitute a battery; and

(ii) the State is not liable to any action, liability, claim or demand merely because a dog touched a person.¹⁰⁶¹

It is our view that an amendment similar to that proposed is both sensible and pragmatic insofar as it would achieve the legislative objective to excuse any slight or unintentional contact that may occur during general drug detection. At the same time, it would not excuse excessive or unauthorised actions of drug detection dogs, or a training regime which encourages dogs to touch people to indicate the presence of drugs, because these actions are unlikely to comply with the requirements in section 9 of the Drug Dogs Act and therefore would not fall within the ambit of the proposed amendment.

Recommendation

39. Parliament consider amending the Drug Dogs Act to clarify the ambiguity that currently exists in relation to the consequences that flow from any slight or unintentional touching that may occur between a drug detection dog and the person being screened during general drug detection.

NSW Police supports this recommendation stating they would welcome any clarification of the Drug Dogs Act to ensure police were not liable for any slight or unintentional touching of a person by a drug detection dog.¹⁰⁶²

14.5. Screening persons ‘seeking to enter or leave’ locations in section 7

Under the Drug Dogs Act police must obtain a warrant to carry out general drug detection in public places. Section 8 of the Drug Dogs Act provides:

- (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.
- (2) A police officer who has reasonable grounds for believing that the persons at any public place may include persons committing drug offences may apply to an authorised justice for a warrant under this section.

‘Public place’ is defined in section 3 of the Drug Dogs Act as:

- (a) a place (whether or not covered by water), or part of premises, that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, and
- (b) a road or road related area, but does not include a school.

However, police are not required to obtain a warrant when carrying out general drug detection at certain locations prescribed in section 7 of the Drug Dogs Act:

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

There is some ambiguity in the expression ‘seeking to enter or leave’ in section 7 because it does not define the precise geographical limits of the locations to which it applies. Rather, the provision appears to require police to assess a person’s intention in order to determine whether the person is seeking to enter or leave a location prescribed in section 7.

For example, a person standing on a footpath in a queue outside a nightclub is arguably seeking (or intending) to enter the nightclub. However, as the footpath is also a public place it may be difficult for police to determine with certainty whether a person is ‘seeking to enter’ the nightclub on the one hand, or is merely in a public place on the other hand.

The practical difficulty that police face is that they are only permitted to carry out general drug detection without a warrant on persons seeking to enter or leave one of the locations specified in section 7. If the person is in a public place then police must first obtain a warrant pursuant to section 8 before they can lawfully carry out general drug detection.

In December 2001, the Ministry for Police wrote to the Crown Solicitor seeking advice in relation to the interpretation of sections 7 and 8 of the Drug Dogs Act. The nub of the interpretation issue was expressed in the following manner:

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 section 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 section 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 section 7 is read in conjunction with section 8 it could be argued that police must obtain a warrant in order to continue operation practice of intercepting persons entering and leaving section 7 premises when the dog stands outside those premises (i.e. on the footpath).¹⁰⁶³

The Crown Solicitor's advice confirmed that there was more than one possible interpretation of the requirements contained in sections 7 and 8. The Crown Solicitor advised that:

If police propose to use a dog in a public place outside the entrance to a public place specified in section 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 section 8.¹⁰⁶⁴

The Crown Solicitor's advice has directly influenced police practice. The NSW Police 'Drug Detection Dogs Management Operational Guidelines' advise police that:

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 general drug detection without a warrant.¹⁰⁶⁵

In practice police will not screen persons who are queuing on the footpath to enter a bar or nightclub unless they have first obtained a warrant under section 8. Similarly, unless a warrant has been obtained, police will only use a drug detection dog behind the barriers at railway stations where a person is required to have a ticket. If police have a warrant for the area surrounding the station they will also use the dog to screen people seeking to enter and leave the railway station.

There are potentially some advantages for police being able to screen persons as they queue to enter certain locations. For example, screening persons in the queue outside a noisy and crowded venue may avoid the need to take the drug detection dog inside the venue. On the other hand, some proprietors may be concerned about the impact that a police presence outside their venue may have.

We received a number of submissions that addressed the ambiguity arising out of the expression 'seeking to enter or leave' in section 7.

NSW Police made the following submission:

To remove any ambiguity in interpretation ... NSW Police suggests that consideration be given to an amendment to each subsection of section 7 by including the words 'or near' following the words 'persons at' or 'persons on', where respectively appearing.

In the alternative, consideration could be given to repealing section 8 of the [Drug Dogs] Act (which relates to the necessity to obtain authority by way of warrant to conduct general drug detection) and substitute legislation empowering a police officer of or above the rank of Superintendent to authorise the use of drug detection dogs for such purposes. This would result in savings in time and associated costs.¹⁰⁶⁶

The Police Association of NSW stated that:

it is absolutely paramount that the restrictions imposed are removed so as to allow drug dogs to be able to operate anywhere a Constable can lawfully patrol, without warrant. This would alleviate any legal arguments over whether someone was seeking to enter any of the abovementioned locations.¹⁰⁶⁷

A submission from a NSW Police local area command suggested that section 7(1)(a) be amended to allow drug detection dogs to be used within a certain radius of a licensed premises. The submission argued that this would allow accompanying car parks and queues outside licensed premises to be searched. A radius of 50 metres was thought to be sufficient.¹⁰⁶⁸

The Shopfront Youth Legal Centre was of the view that section 7 is ambiguous in its application to persons seeking to enter or leave premises such as nightclubs and pubs:

If the section is interpreted in a way which allows dogs to be used outside venues, various problems may arise. For example, how far outside the venue are the dogs allowed to go? What can be done to prevent the targeting of other members of the public, who are not seeking to enter the venue but are just walking or standing by?

We agree with current police policy of seeking a warrant to perform drug detection among people queuing to enter premises. We believe that section 7 should be amended to reflect this policy and to specify that drug detection dogs may not be used outside the relevant premises without a warrant.¹⁰⁶⁹

The NSW Attorney General's Department suggested that:

Any recommendation for clarification of ambiguity of the limits of "authorised places" should be consistent with the policy of strict limits being set for general drug detection in public places. Any extension proposed to cover persons who are outside relevant premises and seeking to enter should be strictly defined.¹⁰⁷⁰

It is clear that the combination of sections 7 and 8 is ambiguous in respect to the interpretation of the expression 'seeking to enter or leave'. We note that NSW Police has suggested that expressions in section 7 be amended to 'persons at or near' and 'persons on or near'. However, the terminology 'or near' is also potentially ambiguous and open to various interpretations and thus it is questionable whether certainty would result from such amendment.

One way of removing the ambiguity in section 7 would be to limit the power to carry out general drug detection without a warrant to in or on specified locations. The expression 'seeking to enter or leave' in sub-sections (1)(a), (b) and (c) could then be removed which would result in what is effectively current police practice. That is, police carrying out general drug detection in or on the specified location in section 7 without a warrant, and obtaining a warrant for the public place outside the location under section 8.

We note that NSW Police has suggested that section 8 be repealed and replaced with a regime where senior police officers authorise the use of drug detection dogs in locations not specified in section 7. We agree that the NSW Police suggestion would reduce administration and result in some cost savings for police. However, as discussed in Chapter 10 'Drug detection warrants and police intelligence', we are of the view that it would be preferable for police to obtain warrants for *all* drug detection dog operations and for the system of judicial oversight of the intelligence used to justify warrant applications to continue. If this recommendation is not accepted, clarification of existing provisions should be considered.

Recommendation

40. Parliament consider amending section 7 of the Drug Dogs Act to clarify the ambiguity created by the expression 'seeking to enter or leave'. Alternatively, Parliament consider removing the expression 'seeking to enter or leave' in section 7 altogether.

NSW Police supports this recommendation and advised that they have received legal advice from the Crown Solicitor that consideration should be given to amending the legislation to clarify the issue.¹⁰⁷¹

14.6. Screening of vehicles in public places

Police are able to carry out general drug detection on *persons* in a public place if authorised to do so by a warrant issued under section 8 of the Drug Dogs Act. However, in relation to *vehicles* two questions arise. First, are persons inside vehicles in a public place for the purposes of the Drug Dogs Act? Second, does general drug detection include the screening of unoccupied vehicles that are in a public place?

14.6.1. Screening of occupied vehicles in public places

It may be possible to argue that when screening a vehicle with occupants in a public place, police are actually screening persons in a public place. However, this argument is problematic because the inside of a vehicle is probably not a public place for the purposes of the Drug Dogs Act.

The issue of whether the inside of a vehicle is a public place arose in *Hardman v DPP*.¹⁰⁷² The majority¹⁰⁷³ in *Hardman* held that the inside of a vehicle was not a public place for the purposes of Part 3B of the *Crimes Act 1900* which regulates the possession of firearms and explosives in public places. The majority in *Hardman* also held that the determination of whether a person was in a public place ultimately turns on the terms of the particular legislation.

After the decision in *Hardman* the Parliament amended Part 3B of the *Crimes Act* which now deems a person in a vehicle to be in a public place if the vehicle is in a public place.

Senior counsel we briefed noted that no similar deeming provision exists in the Drug Dogs Act and thus was of the view that there was no power in the Drug Dogs Act authorising general drug detection with respect to persons who are inside a vehicle, which is itself in a public place.¹⁰⁷⁴

Senior counsel further noted that:

*it is clear from the provisions of sections 4, 7 and 8, that the thrust of the [Drug Dogs] Act is in relation to individuals, not of inanimate objects such as vehicles and buildings. In those circumstances, a person in a vehicle is not in a public place.*¹⁰⁷⁵

Accordingly, senior counsel was of the view that persons located inside a vehicle may only be lawfully searched in circumstances where:

- Police have a valid search warrant authorising a search of the vehicle and any person in it, or
- Police have formed a reasonable suspicion required by section 37(4) of the *Drug Misuse and Trafficking Act*.¹⁰⁷⁶

The following COPS event narrative illustrates an example of a search of a vehicle and its occupants as a result of a drug detection dog indication on the vehicle in a public place.

On [date], Police from [Local Area Command name] Target Action Group with the assistance Sydney Drug Unit Officer, commenced a pro-active overt operation [operation name].

About 4.30pm on this date Police were patrolling [name of street], [name of locality] with [a] drug detection dog. The drug detection dog passed a [description of vehicle] bearing the registration plates [registration number].

The drug detection dog indicated at the rear of this vehicle that there may be prohibited drugs within this vehicle.

As a result the owner of the vehicle, [name], and two passengers were requested to exit the vehicle.

Police made a search of the vehicle and found one empty but previously used resealable plastic bag.

Police then made a cursory search of each person. Police located a medium sized resealable plastic bag in the left pants pocket of [name]. This resealable plastic bag contained cannabis.

The defendant was cautioned. The defendant stated the cannabis was for personal use. The defendant was afforded the opportunity of an interview however declined.

The defendant was issued with a Field Court Attendance Notice ...

*The total weight of the cannabis is 10 grams.*¹⁰⁷⁷

The above example illustrates the practical difficulties faced by police when carrying out general drug detection in public places where occupied vehicles are located. For example, police are arguably not authorised by the Drug Dogs Act to carry out general drug detection on any vehicle in a public place. But what if a drug detection dog makes an indication on a parked vehicle with occupants – are police expected to ignore this?

In circumstances where police have not strictly complied with the Drug Dogs Act, they may obtain consent to carry out searches of vehicles and their occupants. While this may remove the potential for a later argument that they were acting without lawful authority, the obtaining of genuine and informed consent may also present legal complications. The issue of consent is discussed below (at paragraph 14.8).

Senior counsel was not able to provide a definitive answer to the question of what regard police may have to an external indication of an occupied vehicle during general drug detection activities:

*it seems to me that in fulfilling the subjective element required of a police officer in forming a reasonable suspicion, it would be open to such an officer to have regard to a fact, namely an indication by a dog of the presence of a drug, although that indication was an unlawful one.*¹⁰⁷⁸

However, senior counsel had some reservations about the formation of reasonable suspicion in these circumstances:

*I very much doubt that a court would find such a suspicion to be a reasonable one, if it substantially or entirely depended upon the 'unlawful' indication. I favour this view because courts are generally reluctant to permit the relaxation of standards and obligations imposed by statute, in any way, unless there is a countervailing, and more significant interest. Section 138 of the Evidence Act permits such a balancing consideration, in the circumstances there set out. But it is difficult to discern any balancing factor in the present area for consideration. Hence my opinion that the better view is that the suspicion would not be found to have been reasonably formed if it relied wholly or substantially upon an unlawful act by a dog.*¹⁰⁷⁹

NSW Police has suggested that:

To provide clarification, consideration might be given to an amendment to the definition of 'public place' by including an additional sub-clause to the effect that 'a person who is in a vehicle or vessel in a public place is taken to be in that public place'.¹⁰⁸⁰

The amendment to the Drug Dogs Act proposed by NSW Police would result in an expansion of police powers in relation to vehicles which would require careful consideration by Parliament.

There is a certain logic to deeming persons in vehicles as being in a public place given anecdotal evidence suggesting that low-level drug dealing from vehicles has increased.¹⁰⁸¹ Thus, if police were able to obtain a warrant under section 8 of the Drug Dogs Act to carry out general drug detection in a public place, then it would be sensible for police to have the power to screen occupied vehicles located in that public place.

We note the proposed amendment would not permit police to stop vehicles given the prohibition on detaining persons for the purpose of general drug detection in section 10(b) of the Drug Dogs Act. Therefore, only screening of stationary vehicles with occupants located in the public place covered by the warrant issued under section 8 of the Drug Dogs Act would fall within the ambit of the proposed amendment.

Recommendation

41. Parliament consider amending the Drug Dogs Act to deem a person inside a vehicle in a public place to be in the public place.

NSW Police supports this recommendation and notes that the proposed amendment would make the Drug Dogs Act consistent with section 93F(2) of the *Crimes Act 1900* and section 3(2) of the *Summary Offences Act 1988*.¹⁰⁸²

14.6.2. Screening of unoccupied vehicles in public places

The NSW Police 'Drug Detection Dogs Management Operational Guidelines' advise police that:

Under the [Drug Dogs Act] police have no power to carry out 'general drug detection' on a motor vehicle unless a warrant has been issued for that purpose under section 8(1) of the [Drug Dogs] Act.

This does not preclude a dog being used to assist in the search of a motor vehicle under any other Act after a police officer reasonably suspects that the vehicle or person is involved in the commission of a drug offence.¹⁰⁸³

It is reasonably clear that the Drug Dogs Act does not authorise the screening of unoccupied vehicles in public places because, like unattended personal property (discussed below at paragraph 14.7), such vehicles are not in the possession or control of a person as required by section 5 of the Drug Dogs Act.

Senior counsel we briefed made the following observations in relation to unoccupied vehicles:

Section 5 of the [Drug Dogs] Act defines general drug detection. That definition refers only to the detection of prohibited drugs "... in the possession or control of a person ...". I am of the view that this definition is not broad enough to permit generally, the screening of unoccupied vehicles ... by the drug detection dogs.¹⁰⁸⁴

The practical application of not screening vehicles in public places may present certain difficulties for police undertaking general drug detection. For example, what action, if any, should police take when a drug detection dog indicates upon an unoccupied vehicle during the course of general drug detection activities? This issue is discussed in the context of unattended property below (at paragraph 14.7.3).

Senior counsel also noted that:

if a [search] warrant [issued under the Search Warrants Act 1985] was obtained permitting the search of an unoccupied vehicle, then s 4 of the [Drug Dogs] Act would permit the police officer executing the warrant to be accompanied by a dog.¹⁰⁸⁵

However, a drug detection warrant issued under section 8 of the Drug Dogs Act only authorises 'general drug detection', which is confined to 'the detection of prohibited drugs or plants in the possession or control of a person' which does not appear to include an unoccupied vehicle.

We note that the Police Association of NSW took a broader view:

if a dog indicates a vehicle, the owner would then need to be identified and the vehicle searched.¹⁰⁸⁶

14.7. Screening of personal property

Police are able to carry out general drug detection on *persons* in certain locations specified in section 7 of the Drug Dogs Act, or on *persons* in a public place if authorised to do so by a warrant issued under section 8 of the Drug Dogs Act. However, in relation to *personal property* two questions arise. First, does general drug detection include the screening of personal property? Second, when is an item of personal property sufficiently connected to a person to bring it within the 'possession or control' requirement of general drug detection in section 5 of the Drug Dogs Act?

14.7.1. Does general drug detection include the screening of personal property?

The NSW Police 'Drug Detection Dogs Management Operational Guidelines' advise police that:

If the property in question is under the control of any person the provision of the [Drug Dogs Act] and the procedures in relation to Person Screening (General Drug Detection) should be followed.

This procedure is when the drug detection dog is used to screen the free air space around property.

*The handler is to avoid letting the dog come into contact with the property.*¹⁰⁸⁷

It appears that the Drug Dogs Act authorises the screening of personal property that is under the control of a person. For example, a backpack or handbag being carried by a person would be considered under the control of a person enabling police to screen these items of personal property during general drug detection activities.

A separate question is whether police are able to screen unattended personal property. The following COPS event narrative illustrates an example of a search of unattended personal property as a result of a drug detection dog indication:

LOCATION: [name of hotel, street, city]

About 5.50pm on [date] whilst performing a drug detection dog operation in [name of locality] CBD dog [name of dog] detected the 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.*¹⁰⁸⁸

It is arguable that police are not authorised to screen unattended personal property because such property is not in the possession or control of a person required by section 5 of the Drug Dogs Act.

It would be preferable, as a matter of policy, for police to screen and search personal property with the owner present thereby avoiding any allegations of corrupt conduct. This practice would also avoid the practical difficulty of establishing and proving ownership of unattended property such as bags and jackets.

Senior counsel we briefed made the following observations in relation to unattended personal property:

*Section 5 of the [Drug Dogs] Act defines general drug detection. That definition refers only to the detection of prohibited drugs "... in the possession or control of a person ...". I am of the view that this definition is not broad enough to permit generally, the screening of ... unattended property by the drug detection dogs.*¹⁰⁸⁹

14.7.2. When is personal property under the control of a person?

On one occasion we observed police conducting a drug detection operation on an interstate train. The Officer-In-Charge of the operation sought and obtained permission from the train guard to enter the luggage compartment. Police videoed both the guard giving permission to enter the luggage compartment, and all drug detection dog indications on bags. The Operational Orders for the operation stated that all bags indicated by the dog may be opened and searched. The searching of the bags by police was to be videoed. However, police did not search any bags until their owners had claimed them. No drugs were located in the bags that were searched with their owners present.

The question that arises is whether the luggage screened during the police operation on the train was under the control of a person.

NSW Police are of the view, based on internal legal advice, that the train guard was the person who was in control of the luggage for the purposes of section 5 of the Drug Dogs Act.¹⁰⁹⁰

Whilst it appears that police do not have the power to screen unattended property, it may be arguable that the luggage example is an exception to this general proposition because owners arguably transfer control of their bags to the train guard. However, as noted above, it may not be good police practice to search bags without their owners being present.

We note that the Police Association of NSW took a broader view in relation to screening and searching unattended property:

*In every circumstance, police should be able to use drug dogs to screen people, property or any other thing they encounter in their lawful patrols. Police should have the power to search any property indicated by a drug dog and in the absence of any person in possession of that property, search it for drugs and anything that may identify the owner.*¹⁰⁹¹

14.7.3. Screening unattended property in public places

We noted above (at paragraphs 14.6.2 and 14.7.2) that police are placed in a difficult situation when a drug detection dog makes an indication on an item of unattended personal property or an unoccupied vehicle in a public place. On the one hand, the Drug Dogs Act does not provide for the screening of unattended property in public places because such items are not in the possession or control of a person as required by section 5. But on the other hand, it would be unreasonable to expect police to ignore or not act upon an indication.

When a drug detection dog makes an indication on unattended property various practical issues arise. For example, if police decide to search unattended property this may lead to allegations of corruption if prohibited drugs are located. There are also privacy and civil liberties considerations when searching property in circumstances where the owner is not present. Clearly it would be preferable for police to attempt to identify the owner of the property before commencing any search but this may not always be possible or practicable.

In our view the legality of screening unattended property should be clarified. If the intention of the Drug Dogs Act is to permit screening of unattended property, then it should be stated explicitly. Further, if screening of unattended property is permitted, then the legislation and/or operational guidelines should address issues of corruption and reduction of civil liberties. For example, police should be required to take all reasonable steps to ensure that the owner of the property is present during any search as a result of an indication. If this is not possible or practicable, police should consider videotaping the search, or alternatively, ensure that an independent officer oversees the search.

Recommendations

42. Parliament consider clarifying the legal position in relation to the screening of unattended property in public places. In the meantime, NSW Police ensure officers take all reasonable steps to avoid screening unattended property.
43. If screening of unattended property in public places is to occur, safeguards should be developed to address the situation where property is searched without the owner being present.

NSW Police supports the proposed clarification of the legal position in relation to the screening of unattended property in recommendation 42 and advised that:

*During deployments it can become problematic to avoid the screening of unattended property as the drug dog indication invariably occurs before it is determined that 'property' is unattended. A dog uses the free air space and they cannot be trained to differentiate between unattended property and attended property. A handler is trained to watch his/her dog to detect a change in the dog's behaviour and invariably the handler is not visually taking in the larger search area until the dog indicates a particular area or person. Handlers ensure that the dog remains within the designated search area and generally guides the dog in a systematic pattern during a search.*¹⁰⁹²

NSW Police indicated in principle support for recommendation 43 and advised that:

The inability to screen unattended property in a public place causes challenges for a Dog Team. In the event a dog has a change of behaviour, the Dog Team will attempt to locate the source of the scent and until the dog indicates, the Dog Team will be unable to determine the exact source. Preventing the screening of unattended property will lead to confusion during screening/searching activities. Dog Teams and Support Police may also have difficulty in determining what is unattended property, as opposed to discarded property, due to the visible presence of Drug Detection Dog Teams.

NSW Police will consider if any additional measures can be put in place to assist dog teams and support police to ensure that they do not search unattended property without the owner being present. However, as noted, given the nature of the way in which dogs screen for drugs, the preferred way to address this issue is through legislative amendment as recommended above at recommendation 42.¹⁰⁹³

14.8. Consent

Police sometimes seek consent of persons to carry out screening or searching of persons or property in circumstances where they may not otherwise be authorised to screen or search. This type of policing is sometimes known as 'policing by consent' or 'consensual policing'.

It has been noted that this type of policing relies upon a combination of factors that include:

- a person's ignorance of their rights under the law
- a person's unquestioning belief that police are acting within their powers, and
- a person's fear that guilt will be implied if they refuse to co-operate with police.¹⁰⁹⁴

However, it should also be noted that individuals provide consent in the spirit of cooperation and because they wish to assist police.

A question that arises is whether the consent of a person during general drug detection overrides the various requirements and safeguards contained in the Drug Dogs Act.

For example, police are arguably not authorised to use drug detection dogs to screen premises, vehicles or things because the focus of general drug detection in the Drug Dogs Act is on persons. However, NSW Police noted that:

there may be occasions where consent is obtained by the owner of a premise, place or thing. However, it would be preferable, in these situations, for police to obtain informed consent, by advising the relevant persons that there is no legislative compulsion to allow the search and by explaining the reason of the search. Mere acquiescence or failure to object would not amount to informed consent.

Arguably, once police have received informed consent from a person there should be no impediment to the use of a detection dog at localities where they are otherwise unauthorised by the [Drug Dogs] Act.

The disadvantage of this type of screening is that it is dependent on such consent. In the absence of such consent, police would generally have to obtain a search warrant.¹⁰⁹⁵

The Police Association of NSW approached the question of obtaining consent for unauthorised activities from a different angle:

To reduce the need for [consent], police should be empowered to use the dogs in any public location. If it is a private location, then a warrant is necessary. This removes any suggestion that police coerced someone into allowing a search by 'permission'.¹⁰⁹⁶

The Office of the Director of Public Prosecutions was of the following view in relation to the question of consent:

Section 6 provides that a police officer is authorised to use a dog to carry out general drug detection, but only as provided by this Part. The position under other legislation relating to police powers is that if a person consents to the search then it will not be held to be unlawful (DPP v Leonard [2001] NSWSC 797). There does not appear to be any reason to construe the position differently under this legislation.

One disadvantage of this type of policing is the issue of young adults being asked to consent to a search. This group of people are not generally aware of their rights to refuse to consent and are generally more likely to be targeted in this sort of operation. A further disadvantage is the lack of clarity in this sort of policing, in that it creates the opportunity for it to be argued in court that consent was given voluntarily.

In *DPP v Leonard*¹⁰⁹⁷ it was accepted as a correct statement of law that police do not conduct an illegal search where they obtain the consent of the accused before carrying out the search.¹⁰⁹⁸ Thus the question of reasonable suspicion required under section 37(4) of the *Drug Misuse and Trafficking Act 1985* does not arise once police have obtained *informed consent* to carry out a search of a person or vehicle.

The issue of what constitutes informed consent was also examined in *DPP v Leonard*. James (Greg) J held that consent given voluntarily and without coercion could be characterised as informed consent. His Honour also held that a person's awareness of the right to refuse consent might be a factor when examining whether police obtained informed consent. However, his Honour accepted:

that a person may consent to an investigative procedure taking place without being aware that he has a right to withhold his consent to the procedure taking place. This conclusion is, of course, subject to any statutory provision to the contrary.¹⁰⁹⁹

14.8.1. Consent and detaining persons for the purpose of screening

The Drug Dogs Act does not confer a power on police to detain a person for the purpose of screening them with a drug detection dog. Relevantly, section 10 of the Drug Dogs Act provides:

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

...

(b) to detain a person who the officer is not otherwise authorised to detain.

The practical application of the safeguard in section 10(b) of the Drug Dogs Act operates somewhat ambiguously.

For example, a person who attempts to leave an area before the drug detection dog is able to screen them may be stopped and spoken to by police. The delay in the person leaving may allow the dog time to screen the person. Police may also seek the 'consent' of a person to be detained until he or she has been screened by the dog.

The issue of detaining a person for the purpose of screening by a drug detection dog was raised in a court case resulting from an operation under the Drug Dogs Act:

Case study

Man screened when leaving nightclub

Police were conducting a drug detection dog operation in a western Sydney nightclub. Shortly after midnight the accused, a 22-year-old male with no previous convictions, attempted to leave the premises whilst police were conducting the operation in the nightclub. As the accused was about to exit the nightclub a police officer asked the accused if he would mind waiting at the exit. The accused complied with the request.

The following questions and answers from the record of interview between the police and the accused were adduced as evidence at the hearing:

Q81. *When you, when you were first stopped by police ...*

A. *Yeah.*

Q81. *... that was, that was when you were walking ...*

A. *Yeah.*

Q81. *... you had to go home, was it?*

A. *Yeah I was on my way out of the club and then the police officer goes, Where are you going? And I go, I said, I'm going home, and he goes, Do you mind waiting here for a second and don't put your hands near your pockets. I've gone, All right then, and stopped at the rail that was there.*

Q82. *At that time what did you think, what did you think?*

A. *I didn't know what the hell was going on. I, I thought they was, the police was doin' a search but that was as far as I knew and then I saw the police dog walking past the pool tables and then the police officer called me over, called the dog to come over and sniff me.*

The drug detection dog indicated the scent of a prohibited drug on the accused. The accused then produced a resealable plastic bag from his pocket containing five tablets (1.7 grams gross weight) believed to be ecstasy, which he maintained an old school friend gave to him five minutes before being stopped by police. The accused was charged with possess and supply prohibited drug.

Counsel for the accused argued that in the circumstances the accused was detained by police in contravention of section 10(b) of the Drug Dogs Act.

The police prosecutor on the other hand submitted that the accused was not detained because he was merely asked by police if he would mind waiting. The prosecutor argued that the accused was not directed to stop and therefore was under no obligation to comply with the request to wait with the police officer at the exit. The prosecutor further argued that the accused was free to leave at any time.

The magistrate held that the accused was not detained within the meaning of section 10(b) of the Drug Dogs Act and made the following observations:

*The [record of interview] in the Court's view clearly indicates that the defendant stopped voluntarily. The Court is not satisfied he was detained. Having stopped voluntarily the police called the dog to come over and sniff him.*¹¹⁰⁰

The accused was convicted and fined \$1000 for possess prohibited drug. The supply prohibited drug charge based on the deeming provision was withdrawn after it was determined that the drug was meth/amphetamine and not ecstasy as originally thought. The traffickable quantity for meth/amphetamine is 3.0 grams.¹¹⁰¹

The above case study demonstrates that fine distinctions are brought into play when police request, as opposed to lawfully direct or demand, that a person remain in a particular place for the purpose of leading a dog to the person for screening.

The distinction between what constitutes a request and a lawful direction may be difficult to discern for a person who is not familiar with the powers being exercised by police. Whilst there is no suggestion of impropriety on the part of police in the case study, in some circumstances requesting persons to stay in one location until a drug detection dog screens them could undermine the safeguards set out in section 10(b) of the Drug Dogs Act. It may be preferable, in these circumstances, for any request to be accompanied by advice that there is no legal obligation to comply with the request.

Another example of the ambiguity in section 10(b) is demonstrated by the following incident detailed in a submission we received:

*[A] couple of months ago I was talking to a friend on [street] [name of suburb] who was fixing his car. I was approached by a police officer who asked me to come around the corner with him. I asked what for and he replied 'Just come around the corner for a minute I'd like to ask you something.' I again asked what for and he repeated his statement. Not having anything to hide I obliged. I walked around the corner to be confronted by five police officers and a drug dog. In other words I was brought to the dog. After the dog sniffed at me, the officers carried on walking up the road. ... I felt as if I had been wrongly apprehended, accused and my rights ignored. And all of this done in public.*¹¹⁰²

On another occasion a member of the public alleged that police had 'impeded his forward movement' so that he could be screened by a drug detection dog:

I hear: "Seek, seek". Handler turns his attention to me, pulling the dog to the side, towards me. He then touches me on the left shoulder with parcel, saying "Stand still". I respond: "No, that's not the way to do it, is it? I don't have to stop; I'm just walking along. I don't mind the dog. How about you smile and at least make it a request? I'm not under arrest. I can just continue walking. No need to touch me. Let the pup do its job, and you do yours. Why not try smiling at the same time?"

Response: "I'm working." He then pushes me solidly this time, saying "Stand still" again.

I say: "If I'm under arrest, I stand still. Don't touch me. This is offensive, or it's an illegal arrest".

*He draws the Labby's attention to my book and bag this time, impeding my forward steps, saying "Seek, seek, seek".*¹¹⁰³

14.8.2. Discussion

It appears that police are acting lawfully when a person consents to screening or searching that is not otherwise authorised by the Drug Dogs Act or some other law. This is a direct result of the application of the decision in *DPP v Leonard*. However, we note that James J suggested that Parliament could legislatively proscribe circumstances in which a person may not consent to a procedure taking place. It is a matter for Parliament to decide the circumstances where police may not use consent to override the requirements and safeguards contained in the Drug Dogs Act or some other law.

In our view it would also be good police practice to obtain explicit consent from individuals. Explicit consent would include informing persons that they have the right to refuse consent notwithstanding that police may not be required to do so as a matter of law. As discussed above (at paragraph 14.8.1), fine distinctions come into play when police make requests which could be easily interpreted as a lawful direction by individuals unaccustomed to dealing with police exercising their powers.

We believe that fair and effective policing involves the provision of information that is essential to a person independently exercising their rights. This includes advising a person that they may freely decline to consent to a request by police in circumstances where police do not have the lawful authority to compel a person to co-operate. Such advice would ensure that legislative requirements and safeguards are not circumvented by a later argument that a person voluntarily co-operated and consented to police conduct that is not authorised by the Drug Dogs Act or some other law.

We also note that the failure to comply with legislative safeguards may potentially jeopardise prosecutions as a result of drug detection dog operations. In our view it would be desirable for police to operate within prescribed legislative safeguards rather than having to rely on consent to validate their actions.

Recommendation

44. NSW Police require police officers to obtain explicit consent, which involves informing persons that they have the right to refuse, in circumstances where police do not have the lawful authority to compel a person to comply with a request.

NSW Police supports this recommendation.¹¹⁰⁴

14.9. Part 10A of the *Crimes Act 1900*

When a prohibited drug is discovered on a person during a drug detection dog operation the person is ordinarily placed under arrest. After placing the person under arrest police sometimes question the person 'in the field' in relation to the drug offence. The purpose of questioning is usually to establish certain facts and issue the person with a cannabis caution or a Field Court Attendance Notice ('FCAN'). A question that arises is whether police must adhere to Part 10A of the *Crimes Act 1900* ('Part 10A') in circumstances where it is administratively convenient to process the person in the field.

14.9.1. Purpose of Part 10A

The purpose of the Part 10A was outlined by the (then) Attorney General, the Hon. Jeff Shaw MLC, during the second reading speech of the Crimes Amendment (Detention after Arrest) Bill 1997 where he said:

*[Part 10A creates] a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures, but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of committing these offences.*¹¹⁰⁵

Part 10A and the associated regulation¹¹⁰⁶ establish a number of safeguards for a person detained after arrest for the purpose of undertaking further investigation of the alleged offence. The safeguards require police to immediately convey a person under arrest to a designated police station where he or she will be introduced to a custody manager who will independently inform the person of their rights and assist the person to exercise those rights.

Section 355(2) of the *Crimes Act* defines 'arrest' in broad terms:

- (2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigatory procedure, if:
 - (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or
 - (b) the police officer would arrest the person if the person attempted to leave, or
 - (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

However, section 355(3) of the *Crimes Act* provides:

- (3) A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or to answer questions.

During the second reading speech of the bill the (then) Attorney General explained that the broad definition of arrest was recognition that:

*even when a person in custody is not formally under arrest, that person may feel or believe that he or she is not free to leave the company of police. Such perception may arise because of something said or implied by the police, but equally it may arise when the person's belief does not arise from actions of police. [Part 10A] ensures that, where appropriate, a situation of that sort is treated in the same way as a situation in which the person is formally under arrest.*¹¹⁰⁷

14.9.2. Compliance with Part 10A 'in the field'

Ombudsman observers noted occasions during drug detection dog operations where individuals detained by police after the discovery of a prohibited drug have not been processed in a manner prescribed by Part 10A. For example, we have observed police carrying out questioning of persons in the field after a drug offence has been detected. The questioning was usually for the purpose of investigating facts that led to the issue of a cannabis caution or FCAN.

There appears to be little doubt that processing a person in the field amounts to an 'investigative procedure' within the meaning of section 355(2) of the *Crimes Act*. NSW Police provided our office with the following internal legal advice in relation to issuing a Criminal Infringement Notice ('CIN') 'on the spot':

*It could not be denied that the purpose of the officer's questioning was to determine (or investigate) the arrested person's involvement in the alleged offence. Accordingly, such a procedure is no less an 'investigative procedure' than is a 'formal' ERISP [Electronic Recorded Interview of Suspect Persons] between a police officer and a suspect. I therefore conclude that questioning of an arrested person by a police officer in relation to the arrested person's involvement in the offence ... is an 'investigative procedure' for the purposes of Part 10A, whether that questioning takes place 'on the street', in the course of a 'formal' ERISP or otherwise.*¹¹⁰⁸

We recognise that the issuing of a cannabis caution, FCAN or CIN in the field results in the individual being processed in a relatively quick, efficient and administratively convenient manner. However, the question that arises is whether the legal rights and protections of the individual are sufficiently protected during this process and whether the departure from Part 10A obligations is within legal parameters and in accordance with notions of public interest.

The vexed question of compliance with Part 10A in the field has arisen in other legislative reviews conducted by this office.¹¹⁰⁹ NSW Police are cognisant of the difficulty that arises when police arrest an individual for the purpose of issuing a cannabis caution, FCAN or CIN and they acknowledge that:

*strict compliance with Part 10A of the Crimes Act would require the person to be taken back to a police station prior to any questioning, presented before a custody manager, informed of their rights and given an opportunity of exercising those rights.*¹¹¹⁰

However, NSW Police argue that strict compliance with Part 10A would defeat the purpose of schemes designed as an alternative to formal arrest and processing. NSW Police has advised officers to assess the importance of any evidence that may be obtained before deciding to process a person in the field. NSW Police described the approach as follows:

*NSW Police has to date, approached the issue from a risk assessment perspective. Having been made aware of the risks (of having evidence obtained in questioning ultimately excluded) police are in a position to make an informed decision as to whether to remove the person to a police station for questioning. Applying such an approach, it is clear that the longer that the person is detained for an investigative procedure and the more important the evidence obtained during that time will be to any subsequent prosecution, the greater the risk that there will be an exclusion of the evidence – and therefore the greater the need to process the person in accordance with Part 10A.*¹¹¹¹

There appears to have been no direct judicial consideration of the failure to adhere to provisions of Part 10A while carrying out investigative procedures in the field. However, the courts have commented on the legislative scheme prescribed in Part 10A on a number of occasions. For example, in *R v Rondo*, Spigelman CJ emphasised that the investigative needs of police must be balanced against the rights and interests of the suspect:

*Part 10A of the Crimes Act seeks to reconcile in a balanced manner the conflicting interests involved in ensuring the efficacy of police investigations, on the one hand, and respecting the rights of citizens, on the other hand.*¹¹¹²

The courts have also referred to the importance of compliance with Part 10A. In *R v Dalley*, Simpson J noted:

*In an important respect Part 10A effected a radical departure from previously long-established common and statutory law. For the first time, in New South Wales, it permitted the arrest and detention of persons suspected of crime for the purpose, not of being charged, but to enable the investigation of their (suspected) involvement in the commission of offences (s 354). It therefore contains important provisions intended to protect the rights of persons under such detention (s 354(c)) ... Those protective provisions are, in my opinion, of significance. They are not to be treated as formalities, failure to observe which will necessarily or readily be overlooked by the courts administering criminal justice.*¹¹¹³

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

*It is important that police officers appreciate that the regime now established [by Part 10A] is designed to secure ethical and fair investigations, as well as the protection of individual rights ...*¹¹¹⁴

Wood CJ at CL also discussed the possible consequences of non-adherence to the provisions in Part 10A:

*The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.*¹¹¹⁵

The foregoing remarks demonstrate that compliance with Part 10A is considered important by the courts. Thus the police approach of employing a risk assessment when processing persons in the field has the potential to jeopardise prosecutions insofar as evidence (such as an admission) obtained in contravention of the provisions of Part 10A may be excluded (pursuant to the discretions contained in sections 90 and 138 of the *Evidence Act 1995*).

It is worth noting that cannabis cautions are issued at the discretion of police and do not normally involve legal processes which would attract any judicial scrutiny. However, the issuing of a FCAN represents the commencement of legal proceedings and therefore any successful challenge to evidence obtained while the person is processed in the field may lead to the failure of the prosecution.

We have noted occasions where police have obtained admissions *before* complying with the provisions of Part 10A. The following COPS event narrative illustrates an example where police complied with Part 10A only after the accused made certain admissions in a notebook record of interview with police.

On [date] police were conducting [operation name] duties at the Olympic Park site. About 9.25am the same day Drug Dog [name of dog] approached the defendant [name of defendant] who was standing with a group of friends ... The drug detection dog sat next to the defendant and was approached by the dog handler and pulled aside where he was cautioned and arrested.

The defendant was then subjected to a search which the defendant removed from his underwear 2 x resealable plastic bags containing green vegetable matter, 2 x plastic resealable plastic bags containing amphetamines (speed), and 3 ecstasy tablets in a plastic resealable bag.

The defendant was then escorted into a room where the prohibited substances were weighed in front of the defendant on electronic scales. The cannabis recorded 2.2 grams, amphetamines 0.6 grams and ecstasy tablets 0.7 grams which was deemed as supply.

The defendant then participated in a notebook record of interview to which he stated the green vegetable matter to be cannabis, the tablets to be ecstasy and the powder to be speed.

...

*The defendant was then conveyed to Flemington Police Station where he was introduced to the custody manager and given a copy of Part 10A.*¹¹¹⁶

The question that arises is whether complying with Part 10A *after* admissions have been obtained sits comfortably with the safeguards contained in Part 10A. As noted above, Part 10A is designed to protect the rights and interests of suspects as well as permit police to carry out investigative procedures for a defined period of time after a suspect is arrested. One of the important roles of the custody manager is to ensure that a suspect understands his or her legal rights in relation to investigative procedures such as police interviews. The provision of this information after a notebook record of interview has taken place does not appear to conform with the safeguards contained in Part 10A and thus it is possible that evidence of admissions obtained in this manner may be excluded by a court.

Clearly there is some benefit of processing persons in the field insofar as it is administratively convenient and accords with the purpose of regimes designed to be an alternative to formal processing after arrest. However, the judiciary has indicated its preference for Part 10A safeguards to be faithfully observed by police officers. In addition, non-compliance with legal requirements as a risk management exercise is hardly a desirable course. It is contrary to the rule of law. In the circumstances it would be preferable for the ambit of Part 10A to be clarified in relation to processing persons in the field. In the meantime, police should comply with legal requirements.

Recommendations

45. Police comply with the requirements of Part 10A of the *Crimes Act 1900* unless and until an appropriate legislative amendment is made.
46. Parliament consider the application of Part 10A of the *Crimes Act 1900* to the processing of persons in the field to determine whether amendments ought be made to allow for alternative arrangements to those set out in Part 10A.

NSW Police indicated that these recommendations were under consideration and advised that:

*NSW Police and the Attorney General's department have made submissions on Part 10A (now Part 9 of LEPPRA) and those submissions have been referred to the Cabinet Office for review. NSW Police will await the advice of the Cabinet Office prior to making a determination on this recommendation.*¹¹¹⁷

14.10. Use of drug detection dogs in the execution of search warrants

Section 4 of the Drug Dogs Act states in part:

- (1) *If a police officer is authorised to search a person for the purpose of detecting a drug offence, the officer is entitled to use a dog for that purpose.*
- (2) *A police officer is, for the purpose of detecting a drug offence, entitled to be accompanied by a dog under the officer's control if the officer is entitled to enter, or be on, particular premises in the exercise of the officer's functions.*

Section 6 of the Drug Dogs Act provides:

A police officer is authorised to use a dog to carry out general drug detection, but only as provided by this Part.

Section 4(2) of the Drug Dogs Act envisages the use of a drug detection dog in circumstances where the authority to enter, or be in or on particular premises is not conferred by the Drug Dogs Act. An example of this would be the execution of a search warrant.

It is unclear from the scheme of the Drug Dogs Act what the drug detection dog is authorised to do in circumstances where a search warrant is issued in relation to private premises pursuant to the *Search Warrants Act*.

The ambiguity arises from the fact that section 5 of the Drug Dogs Act defines 'general drug detection' for *the purposes of the Act* as the detection of prohibited drugs in the possession or control of a person. Section 6 of the Drug Dogs Act authorises a police officer to utilise a dog to carry out 'general drug detection', but *only* as provided by Part 2 of the Act. Part 2 of the Act contains sections 7 and 8 which authorise 'general drug detection', on persons at, or seeking to leave licensed premises, certain public places and public transport, but does not include private premises.

The question that arises is whether the Drug Dogs Act authorises 'general drug detection' using a dog, during the execution of a search warrant on private premises. Police may be issued with a search warrant to search for things specified in the warrant which are in or on private premises pursuant to the *Search Warrants Act*. The search warrant authorises entry to the premises which would then authorise police to be accompanied by a dog pursuant to section 4(2) of the Drug Dogs Act. But what the drug detection dog is able to do whilst in the company of the police officer is unclear.

Arguably the drug detection dog is not authorised to carry out 'general drug detection' on persons located in or on the private premises specified in the search warrant. Support of this view is found in section 9(4)(b) of the Drug Dogs Act which states that the provisions of Part 2 'do not affect any search of premises that *does not involve a search of persons in or on the premises*'. [Emphasis added]

Further, section 8(a) of the *Search Warrants Act* only authorises a police officer to search a person found in or on the premises if the officer *reasonably suspects* that the person has a thing or things mentioned in the search warrant. Thus it appears that a drug detection dog utilised during the execution of a search warrant is only able to screen the premises and not persons located in or on the premises. It is unclear whether this was an intended consequence of the legislation.

It is noted that section 4(1) of the *Drug Dogs Act* authorises a police officer to use a dog in circumstances where the officer is authorised to search a person for the purpose of detecting a drug offence. That is, the drug detection dog could only be used *after* the officer has formed the necessary reasonable suspicion to conduct the search.

14.10.1.1. Discussion of the issue in submissions and legal advice

We raised this issue in our discussion paper and received a number of responses.

NSW Police agreed that there was some ambiguity in the meanings of sections 4 and 5 of the *Drug Dogs Act* when read together. NSW Police concurred with the view expressed in the discussion paper that it was possible that when police were lawfully in a private place but not otherwise entitled to search a person, police may not be able to use a drug detection dog for general drug detection.¹¹¹⁸

Redfern Legal Centre responded as follows, to the question in our discussion paper about whether the *Drug Dogs Act* provided sufficient clarity on this issue:

*In short, no, it does not. The [Drug Dogs] Act must be amended to extinguish the ambiguity about whether police can conduct general drug detection operations (using drug detection dogs) when on private premises where they are not otherwise entitled to search a person (see sections 4(2) and 5 of the Act.) The [Drug Dogs] Act must be amended to ensure that police do NOT have such a right to conduct that search.*¹¹¹⁹ [Original emphasis]

The Office of the Director of Public Prosecutions submitted:

*The phrasing of the [Drug Dogs] Act on the construction suggested does appear to be open to the interpretation that in a private place a drug detection dog cannot be used – however a contrary view could be taken. Section 8 in Part 2 appears to be directly related to the use of dogs in executing search warrants. Where there is not clarity it is appropriate to amend the legislation, that being a preferable course to litigation.*¹¹²⁰

The Attorney General's Department commented in its submission:

*Part 2 clearly limits general drug detection to PERSONS in certain public places. It is arguable that police acting under the authority of a Search Warrant under the Search Warrants Act 1985 should be able to use drug detection dogs subject to a requirement that it be authorised as a condition of the search warrant on the basis of a justice being satisfied of specified matters. A search warrant under the Search Warrants Act can be distinguished from the position under section 7 of the [Drug Dogs] Act that general drug detection under a warrant applies to persons only. Search warrants are granted on the basis of specific intelligence giving rise to reasonable suspicion of offences in relation to certain persons, places and times. General drug detection under the [Drug Dogs] Act is based on beliefs formed on the basis of general intelligence whether it is with or without warrant.*¹¹²¹

We sought legal advice on this issue and received the following response:

*If the police are authorised to be on premises, section 4(2) extends the operation of the Act to those premises, thereby permitting a dog to be present on the premises. However, the dog would not be carrying out general drug detection activities within the meaning of s 5 of the [Drug Dogs] Act. Rather, it would be present and participating in an authorised search of either premises or a person: see s 4 of the [Drug Dogs] Act.*¹¹²²

14.10.2.2. LEPRA

From 1 December 2005 the provisions of the *Drug Dogs Act* form part of the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA'). The ambiguity in the legislation has to some extent been clarified by LEPRA. Part 11, Division 2 of LEPRA sets out the law relating to drug detection dogs. The definition of general drug detection is in section 145:

Meaning of 'general drug detection'

For the purposes OF THIS DIVISION:

'general drug detection' is 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. [Emphasis added]

Section 147 of LEPRA provides:

A police officer is authorised to use a dog to carry out general drug detection, but only as provided by this Division.

In LEPRA all sections of the Drug Dogs Act fall within the one division, as opposed to the segregation of the Drug Dogs Act into a number of parts. Thus the ability to conduct general drug detection on private premises is not excluded by LEPRA and the safeguards (currently in section 9 of the Drug Dogs Act) apply to all uses of the drug detection dogs. In our view, this is an appropriate arrangement. To provide otherwise, would return to the situation prior to the commencement of the Drug Dogs Act, with all its uncertainties and potential for litigation.

If NSW Parliament intends that general drug detection be carried out in this manner, it may nonetheless be useful to explicitly state that police may use a drug detection dog for general drug detection if the officer is entitled to enter, or be in or on particular premises in the exercise of the officer's functions.

Recommendation

47. Parliament consider amending the Drug Dogs Act to explicitly state that police authorised to be on premises may conduct 'general drug detection' with a drug detection dog.

NSW Police supports this recommendation.¹¹²³

Endnotes

- ⁹⁵⁰ Section 22 of the *Crimes (Sentencing Procedure) Act 1999* requires a court to take into account that an offender pleaded guilty and to impose a lesser sentence than would have otherwise been imposed. The utilitarian value of a guilty plea will generally result in a 10-25% discount on sentence depending on the time of the plea and the individual facts and circumstances of the case: *R v Thomson; R v Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383; 115 A Crim R 104.
- ⁹⁵¹ Jerram DCM, Unreported, Downing Centre Local Court, 21 November 2001.
- ⁹⁵² Cited in *DPP v Darby* [2002] NSWSC 1157 (28 November 2002) at [15].
- ⁹⁵³ [2002] NSWSC 1157 (28 November 2002).
- ⁹⁵⁴ [2002] NSWSC 1157 (28 November 2002) at [26].
- ⁹⁵⁵ [2002] NSWSC 1157 (28 November 2002) at [27].
- ⁹⁵⁶ [2002] NSWSC 1157 (28 November 2002) at [27].
- ⁹⁵⁷ *Questions of Law Reserved (No. 3 of 1998)* (1998) 71 SASR 223; 101 A Crim R 395.
- ⁹⁵⁸ [2002] NSWSC 1157 at [42] - [46].
- ⁹⁵⁹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314.
- ⁹⁶⁰ Ipp JA, McColl JA agreeing; Giles JA dissenting.
- ⁹⁶¹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [124].
- ⁹⁶² [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [121].
- ⁹⁶³ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [122].
- ⁹⁶⁴ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [123].
- ⁹⁶⁵ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [76].
- ⁹⁶⁶ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [62].
- ⁹⁶⁷ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [76].
- ⁹⁶⁸ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [91].
- ⁹⁶⁹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [135].
- ⁹⁷⁰ Senior counsel we briefed noted that '[i]t would be open to the Parliament to pass legislation which had the effect of providing that where a dog gave an indication, there was an adequate basis for conducting a search of the individual who had been so indicated. This would remove the necessity for the formation of reasonable suspicion prior to undertaking a search of a person.' (Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 33). This approach has been adopted in Queensland legislation: see *Police Powers and Responsibilities Act 2000* (Qld), s.31D.
- ⁹⁷¹ (1990) 170 CLR 104 at 115 *per curiam* (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and Mc Hugh JJ).
- ⁹⁷² Spigelman CJ and Simpson J agreeing.
- ⁹⁷³ [2001] NSWCCA 540; (2001) 126 A Crim R 562 at [53].
- ⁹⁷⁴ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 8.
- ⁹⁷⁵ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 9.
- ⁹⁷⁶ See Figure 5 'Results of searches following drug detection dog indications' in Chapter 6 'Overview of results'.
- ⁹⁷⁷ For more details see Table 9 'Comparison of the rates at which drug detection dogs successfully indicate drugs' in Chapter 8 'Accuracy of drug detection dogs'.
- ⁹⁷⁸ For more details see Table 9 'Comparison of the rates at which drug detection dogs successfully indicate drugs' in Chapter 8 'Accuracy of drug detection dogs'.

- ⁹⁷⁹ For more details see Table 3 'Comparison of 'drugs found' / 'not found' by main location type' and Table 4 'Proportion of drugs found by selected Local Area Commands' in Chapter 6 'Overview of results'.
- ⁹⁸⁰ NSW Police, *Drug Detection Dog – Preplanned job request form*, p.4.
- ⁹⁸¹ Ministry for Police submission, 30 August 2004.
- ⁹⁸² Police Association of New South Wales submission, 19 August 2004.
- ⁹⁸³ Police Association of New South Wales submission, 19 August 2004.
- ⁹⁸⁴ NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detections Dogs) Act*, June 2004, pp.15-16.
- ⁹⁸⁵ The 27% figure was based on the data for the first year. This figure was revised to 26% by using the same method of calculation with the full two years of data.
- ⁹⁸⁶ Legal Aid NSW submission, 23 August 2004.
- ⁹⁸⁷ NSW Council for Civil Liberties submission, 19 August 2004.
- ⁹⁸⁸ UTS Community Law submission, 23 August 2004.
- ⁹⁸⁹ Redfern Legal Centre submission, 20 August 2004.
- ⁹⁹⁰ NSW Users and AIDS Association submission, 17 August 2004.
- ⁹⁹¹ North Sydney Health submission, 14 July 2004.
- ⁹⁹² The Youth Justice Coalition submission, 20 August 2004.
- ⁹⁹³ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ⁹⁹⁴ Office of the Director of Public Prosecutions submission, 4 August 2004.
- ⁹⁹⁵ Redfern Legal Centre submission, 20 August 2004.
- ⁹⁹⁶ Lustgarten L, 'The Future of Stop and Search', (2002) *Criminal Law Review*, Sweet & Maxwell, pp.603-618.
- ⁹⁹⁷ For further discussion of 'residual' indications see paragraphs 8.2.2, 8.2.3 and 8.2.4 in Chapter 8 'Accuracy of drug detection dogs'.
- ⁹⁹⁸ The figure was 71% in the discussion paper based on data for the first year.
- ⁹⁹⁹ Ministry for Police submission, 30 August 2004.
- ¹⁰⁰⁰ The figure of 80% appears to be a miscalculation. The discussion paper puts this figure at 71%.
- ¹⁰⁰¹ Ministry for Police submission, 30 August 2004.
- ¹⁰⁰² Ministry for Police submission, 30 August 2004.
- ¹⁰⁰³ Ministry for Police submission, 30 August 2004.
- ¹⁰⁰⁴ Redfern Legal Centre submission, 20 August 2004.
- ¹⁰⁰⁵ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ¹⁰⁰⁶ Tony Trimmingham, Family Drug Support submission, 6 August 2004.
- ¹⁰⁰⁷ *Obiter* is a legal term which means that the comments or observations made by the judge did not directly influence the outcome of the case and therefore are not binding as a matter of law in subsequent cases.
- ¹⁰⁰⁸ [2002] NSWSC 1157 at [49].
- ¹⁰⁰⁹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [84].
- ¹⁰¹⁰ NSWPD, Legislative Assembly, 6 December 2001, p.19875.
- ¹⁰¹¹ NSWPD, Legislative Assembly, 6 December 2001, p.19875.
- ¹⁰¹² Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 30.
- ¹⁰¹³ Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 31.
- ¹⁰¹⁴ *Drug Misuse and Trafficking Act 1985*, s.12(1).
- ¹⁰¹⁵ Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 35.
- ¹⁰¹⁶ Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 36.
- ¹⁰¹⁷ NSW Police response to draft final report, 10 March 2006.
- ¹⁰¹⁸ NSW Police response to draft final report, 10 March 2006.
- ¹⁰¹⁹ NSW Police response to draft final report, 10 March 2006.
- ¹⁰²⁰ Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 38.
- ¹⁰²¹ Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 39.
- ¹⁰²² NSW Police response to draft final report, 10 March 2006.
- ¹⁰²³ NSW Police response to draft final report, 10 March 2006.
- ¹⁰²⁴ Ombudsman observer notes, August 2003.
- ¹⁰²⁵ Ombudsman observer notes, April 2003.
- ¹⁰²⁶ Ombudsman observer notes, November 2003.
- ¹⁰²⁷ Ombudsman observer notes, July 2003.
- ¹⁰²⁸ See Chapter 12 'Privacy, civil liberties and police relations with the community' at paragraph 12.2 for further discussion of fearful or anxious reactions to the drug detection dog.
- ¹⁰²⁹ NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detections Dogs) Act*, June 2004, p. 69.
- ¹⁰³⁰ Ombudsman observer notes, December 2002.
- ¹⁰³¹ Ombudsman observer notes, November 2003.
- ¹⁰³² Ministry for Police submission, 30 August 2004.
- ¹⁰³³ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ¹⁰³⁴ Office of the Director of Public Prosecutions submission, 4 August 2004.
- ¹⁰³⁵ Redfern Legal Centre submission, 20 August 2004.
- ¹⁰³⁶ In the context of criminal law, the offences of assault and battery have been collapsed into a single concept of 'assault'. See for example, s.61 of the *Crimes Act 1900*.
- ¹⁰³⁷ [2002] NSWSC 1157 (28 November 2002) at [56].
- ¹⁰³⁸ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [124].
- ¹⁰³⁹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [129].
- ¹⁰⁴⁰ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [130].

- ¹⁰⁴¹ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [131].
- ¹⁰⁴² [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [132].
- ¹⁰⁴³ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [61].
- ¹⁰⁴⁴ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [74].
- ¹⁰⁴⁵ *Collins v Wilcock* [1984] 3 All ER 374 at 378; 1 WLR 1172 at 1177.
- ¹⁰⁴⁶ *Boughey v The Queen* (1986) 161 CLR 10 at 25 per Gibbs CJ, Mason, Wilson, Deane JJ; Brennan J dissenting.
- ¹⁰⁴⁷ *Collins v Wilcock* [1984] 3 All ER 374 at 378; 1 WLR 1172 at 1177.
- ¹⁰⁴⁸ [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 A Crim R 314 at [82].
- ¹⁰⁴⁹ Unreported, Lismore Local Court, 23 June 2004.
- ¹⁰⁵⁰ Unreported, Lismore District Court, 11 March 2005.
- ¹⁰⁵¹ Unreported, Lismore District Court, 11 March 2005 at p.6 of the Judgment Transcript.
- ¹⁰⁵² NSWPD, Legislative Assembly, 6 December 2001, p.19876. See also the Hon. Michael Costa MLC, NSWPD, Legislative Council, 6 December 2001, p.19746.
- ¹⁰⁵³ NSWPD, Legislative Assembly, 6 December 2001, p.19876. See also the Hon. Michael Costa MLC, NSWPD, Legislative Council, 6 December 2001, p.19746.
- ¹⁰⁵⁴ *Police v Darby* (Jerram DCM, Unreported, Transcript of Proceedings, 31 October 2001) at p.4.
- ¹⁰⁵⁵ Correspondence to NSW Police requesting further information, 23 February 2005.
- ¹⁰⁵⁶ Correspondence from NSW Police, 1 April 2005.
- ¹⁰⁵⁷ Bolt S, 'Sniffer dog evidence excluded', (2005) 43(5) *Law Society Journal* 82.
- ¹⁰⁵⁸ NSW Attorney General's Department submission, 17 May 2005.
- ¹⁰⁵⁹ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 44.
- ¹⁰⁶⁰ NSW Attorney General's Department submission, 17 May 2005.
- ¹⁰⁶¹ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 47.
- ¹⁰⁶² NSW Police response to draft final report, 10 March 2006.
- ¹⁰⁶³ Correspondence from Mr Les Tree, Director General, Ministry for Police, to Mr I. Knight, Crown Solicitor, 12 December 2001.
- ¹⁰⁶⁴ I.V Knight, Crown Solicitor, Advice re: Clauses 7 and 8 of the Police Powers (Drug Detection Dogs) Bill 2001, 19 December 2001.
- ¹⁰⁶⁵ NSW Police, *Drug Detection Dogs Management Operational Guidelines*, March 2002, p.9.
- ¹⁰⁶⁶ Ministry for Police submission, 30 August 2004.
- ¹⁰⁶⁷ Police Association of New South Wales submission, 19 August 2004.
- ¹⁰⁶⁸ Northern NSW Local Area Command submission, 6 August 2004.
- ¹⁰⁶⁹ The Shopfront Youth Legal Centre submission, 9 August 2004.
- ¹⁰⁷⁰ NSW Attorney General's Department submission, 17 May 2005.
- ¹⁰⁷¹ NSW Police response to draft final report, 10 March 2006.
- ¹⁰⁷² [2003] NSWCA 130; (2003) 57 NSWLR 390; A Crim R 560.
- ¹⁰⁷³ Tobias & McColl JJA; Meagher JA dissenting.
- ¹⁰⁷⁴ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraphs 60 and 64.
- ¹⁰⁷⁵ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 62.
- ¹⁰⁷⁶ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 65.
- ¹⁰⁷⁷ COPS Event 14.1.
- ¹⁰⁷⁸ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 67.
- ¹⁰⁷⁹ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 68.
- ¹⁰⁸⁰ Ministry for Police submission, 30 August 2004.
- ¹⁰⁸¹ See Chapter 13 'Targeting drug supply' at paragraph 13.9.1.
- ¹⁰⁸² NSW Police response to draft final report, 10 March 2006.
- ¹⁰⁸³ NSW Police, *Drug Detection Dogs Management Operational Guidelines*, March 2002, p.8.
- ¹⁰⁸⁴ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 71.
- ¹⁰⁸⁵ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 72.
- ¹⁰⁸⁶ Police Association of New South Wales submission, 19 August 2004.
- ¹⁰⁸⁷ NSW Police, *Drug Detection Dogs Management Operational Guidelines*, March 2002, p.10.
- ¹⁰⁸⁸ NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, p.66.
- ¹⁰⁸⁹ Peter Garling SC, Memorandum of advice, 9 June 2005, at paragraph 71.
- ¹⁰⁹⁰ Ministry for Police submission, 30 August 2004.
- ¹⁰⁹¹ Police Association of New South Wales submission, 19 August 2004.
- ¹⁰⁹² NSW Police response to draft final report, 10 March 2006.
- ¹⁰⁹³ NSW Police response to draft final report, 10 March 2006.
- ¹⁰⁹⁴ Dixon D, *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, Oxford, (1997), p.106.
- ¹⁰⁹⁵ Ministry for Police submission, 30 August 2004.
- ¹⁰⁹⁶ Police Association of New South Wales submission, 19 August 2004.
- ¹⁰⁹⁷ [2001] NSWSC 797 (14 September 2001); (2001) 53 NSWLR 227; 127 A Crim R 381.
- ¹⁰⁹⁸ [2001] NSWSC 797 (14 September 2001); (2001) 53 NSWLR 227; 127 A Crim R 381 at [46].
- ¹⁰⁹⁹ [2001] NSWSC 797 (14 September 2001); (2001) 53 NSWLR 227; 127 A Crim R 381 at [64].
- ¹¹⁰⁰ *Police v Aaron James Lawson* (Sloane LCM, Unreported, Penrith Local Court, 11 December 2003).
- ¹¹⁰¹ For further information on supply charges and the deeming provision see Chapter 13 'Targeting drug supply'.
- ¹¹⁰² G. Lockitch submission, 9 August 2004.
- ¹¹⁰³ Complaint 42.
- ¹¹⁰⁴ NSW Police response to draft final report, 10 March 2006.
- ¹¹⁰⁵ NSWPD, Legislative Council, 26 June 1997, pp.11234-5.

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- ¹¹⁰⁶ *Crimes (Detection after Arrest) Regulation 1998*.
- ¹¹⁰⁷ NSWPD, Legislative Council, 26 June 1997, pp.11235-6.
- ¹¹⁰⁸ Cited in NSW Ombudsman, *On the spot justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p.107.
- ¹¹⁰⁹ For example, see the discussion at paragraph 12.12 'Part 10A of the *Crimes Act 1900* and video taping' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005; and 'CINs and detection after arrest' in NSW Ombudsman, *On the spot justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, pp.106-8.
- ¹¹¹⁰ Cited in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.141.
- ¹¹¹¹ Cited in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.141.
- ¹¹¹² *R v Rondo* [2001] NSWCCA 540; (2001) 126 A Crim R 562 at [15].
- ¹¹¹³ *R v Dalley* [2002] NSWCCA 284; (2002) 132 A Crim R 169 at [19].
- ¹¹¹⁴ *R v Phung and Huynh* [2001] NSWSC 115 at [38].
- ¹¹¹⁵ *R v Phung and Huynh* [2001] NSWSC 115 at [39].
- ¹¹¹⁶ COPS Event 14.2.
- ¹¹¹⁷ NSW Police response to draft final report, 10 March 2006.
- ¹¹¹⁸ Ministry for Police submission, 30 August 2004.
- ¹¹¹⁹ Redfern Legal Centre submission, 20 August 2004.
- ¹¹²⁰ Office of the Director of Public Prosecutions submission, 4 August 2004.
- ¹¹²¹ NSW Attorney General's Department submission, 17 May 2005.
- ¹¹²² Peter Garling SC, Memorandum of advice, 9 June 2004, at paragraph 74.
- ¹¹²³ NSW Police response to draft final report, 10 March 2006.

Chapter 15. Harm minimisation

This chapter examines harm minimisation and the role of police in strategies that aim to reduce the harms associated with drug use. This includes considering alternatives to court procedures for those detected with small quantities of drugs, policing with drug detection dogs in areas with drug health facilities, and associated issues.

15.1. Overview

15.1.1. Illicit drug use in Australia

The 2004 *National Drug Strategy Household Drug Survey* reveals that almost two in every five Australians (38.1%) aged 14 years and over have used an illicit drug at least once in their lifetime with more than one in seven (15.3%) using an illicit drug in the last 12 months.¹¹²⁴

By far the most common illicit drug consumed was cannabis with over one-third of Australians (33.6%) reporting use at least once in their lifetime. This was followed by meth/amphetamine (9.1%), ecstasy (7.5%), hallucinogens (7.5%), cocaine (4.7%) and heroin (1.4%).¹¹²⁵

Recent drug use was most common among persons aged between 18 and 29 years. Almost one third (31%) of persons in the 18 to 29 age range had used at least one illicit drug and one in four had used cannabis in the last 12 months. In the last 12 months approximately one in eight people aged 20 to 29 years used ecstasy and around one in ten used meth/amphetamine. Similar proportions were noted for young adults aged 18 to 19 years who reported recent ecstasy and meth/amphetamine use at 9% each.¹¹²⁶

A decrease in recent illicit drug use was noted between the 2001 and 2004 surveys. In particular, recent cannabis use has dropped from 12.9% in 2001 to 11.3% in 2004.¹¹²⁷

15.1.2. Persons identified by drug detection dogs

In Chapter 6 ‘Overview of results’ we noted that the median age of persons searched was 26 years. The chapter shows that in the 26% of occasions when a drug was located after a search it was predominately a small amount of cannabis (83.8%), followed by ecstasy (8.5%) and meth/amphetamine (7.7%). Only 14 incidents involved the detection of small amounts of heroin for the two-year review period.

It appears that drug detection dogs are mainly identifying persons that studies illustrate are most likely to be in possession of illicit drugs. Namely, persons aged 18 to 29 years who frequent public places and entertainment venues. These persons mainly consume cannabis and/or ‘recreational’ or ‘party’ drugs. The very small number of heroin detections suggests that drug detection dogs may not be a useful tool to identify heroin users.

The term ‘ecstasy and related drugs’ (‘ERD’) will be used throughout this chapter in recognition of the move away from terms such as ‘recreational’ or ‘party’ drugs which some academics and educators feel glamorise the seriousness and problematic nature of illicit drug use. The term ERD refers to drugs that are commonly consumed at dance parties, raves, music festivals, and nightclubs. ERD include ecstasy, meth/amphetamines, cocaine, ketamine and GHB (Gamma-Hydroxy Butyrate).

A number of submissions we received suggested that a majority of the individuals who were found in possession of drugs as a result of drug detection dog operations were not stereotypical drug users in the sense that their drug use was neither chronic nor involved drug-related crime. For example, one submission noted that most persons apprehended as a result of an operation at a dance party were not typical ‘drug addicts’ insofar as many of them were young, employed or studying, and did not resort to crime to fund their drug use.¹¹²⁸

15.2. What is ‘harm minimisation’?

The term ‘harm minimisation’ refers to strategies that aim to minimise the harms that result from or are a consequence of legal and illegal drug use.

It is important to note that harm minimisation does not condone drug use but recognises that drug use may never be entirely eradicated from society. Harm minimisation principles have formed the basis of successive phases of Australia’s *National Drug Strategy*¹¹²⁹ since its inception in the mid-1980s.

Harm minimisation attempts to strike a balance between activities aimed at reducing drug availability and use through:

- **supply reduction** strategies to disrupt the production and supply of illicit drugs, and the control and regulation of licit substances
- **demand reduction** strategies to prevent the uptake of harmful drug use, including abstinence oriented strategies and treatment to reduce drug use, and
- **harm reduction** strategies to reduce drug-related harm to individuals and communities.¹¹³⁰

The *National Drug Strategy* encompasses a wide range of objectives aimed at improving the health, social and economic outcomes for individuals and communities. Australia's approach can be characterised by four key features:

- 1) adopting harm reduction as the overarching principle based on acceptance that drug abuse can never be totally eradicated
- 2) a comprehensive approach encompassing the harmful use of legal drugs, pharmaceuticals, illicit drugs and other substances such as inhalants and kava
- 3) promoting partnerships between health, law enforcement, and education agencies, community-based organisations and industry, and
- 4) a commitment to a balanced approach between supply reduction, demand reduction and harm reduction, and between all jurisdictions and sectors.¹¹³¹

15.2.1. What is drug-related 'harm'?

In the context of harm minimisation the concept of 'harm' is very broad. Not only does harm refer to the adverse health outcomes that are a direct result of drug use, but it also includes the various adverse impacts on the community that may be a consequence of drug use.

The various health problems that are a direct result of drug use are generally easier to recognise than the indirect harms that may flow from, or are a consequence of drug use.¹¹³² The following list illustrates some of the indirect consequences of drug use:

- intangible social costs such as damage to family and other relationships
- physical harm to fetuses due to drug use during pregnancy
- 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 the break-down of relationships and 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, accidents and law enforcement activities.¹¹³³

15.2.2. The role of police in harm minimisation strategies

Law enforcement strategies such as the use of drug detection dogs are expected to be consistent with and, where possible, complement broader NSW Police support for the harm minimisation objectives in the *National Drug Strategy*.

The *National Drug Strategy* sets the context for policing illicit drug use, providing a comprehensive framework that requires an integrated approach to drug control and reducing drug-related harms. The strategy identifies specific areas for action including:

- prevention
- reduction of supply
- reduction of drug use and related harms, and
- improved access to quality treatment.¹¹³⁴

Police have a critical part to play in implementing these actions, sometimes directly but often in conjunction with other agencies and sectors. Various NSW Police drug policies emphasise the value of harm minimisation as a holistic and pragmatic response to entrenched drug harms and dealing with the causes of hazardous substance use:

Harm minimisation aims to reduce the harmful health, social and economic outcomes of alcohol and other drugs for the community and drug users. Harm minimisation recognises that while total abstinence from illicit

*drug use is the most desirable option, some people will continue to use drugs and it is necessary to minimise the harm that drugs cause.*¹¹³⁵

Although police have particular responsibilities in implementing supply reduction strategies, they also have a central role in other aspects of harm minimisation. A recent national review of the role of police in preventing and minimising illicit drug use and its harms reported that officers across Australia already apply many harm minimisation principles in their day-to-day work.¹¹³⁶ The review found that good practice in relation to harm minimisation is generally good police practice, such as the appropriate use of police discretion not to charge a drug offender if diversion into treatment or some other option is more likely to help deal with the causes of the drug use.

The review also set out various opportunities for police to put harm minimisation principles into practice. Most strategies could be placed under the headings of 'harm reduction', 'demand reduction' and 'supply reduction'.¹¹³⁷ NSW Police training on harm minimisation uses a similar approach, highlighting examples of police work relating to:

- **Supply Reduction:** The training materials highlight examples such as supply interdiction involving customs and other Commonwealth agencies, NSW drug squad operations, regional initiatives, liquor licensing duties and general duties work.
- **Demand Reduction:** Police training on demand reduction notes police diversions into treatment, including Magistrates Early Referral Into Treatment (MERIT), community education and school education.
- **Harm Reduction:** This covers the use of accountable discretion when attending drug overdoses or policing near needle and syringe outlets, operational guidelines for policing near Sydney's Medically Supervised Injecting Centre ('MSIC'), safe searching techniques to avoid needle stick injuries, monitoring of drug-affected prisoners and opportunities for police to refer drug users into treatment.¹¹³⁸

15.2.3. Achieving a balance between supply, demand and harm reduction strategies

Despite widespread acceptance and support for the three pillars of the *National Drug Strategy* – supply, demand and harm reduction, there is spirited debate about the appropriate mix of measures required to achieve an effective balance between these three elements.

NSW Police published its 'NSW Illicit Drug Law Enforcement Performance Indicators' in April 2002, endorsing the three main tenets of harm minimisation and stating that the reduction of harm caused by illegal drugs is a 'central objective of policing'.¹¹³⁹ The main goals identified in that policy call for drug law enforcement to address:

- organised crime and corruption
- drug-related property crime (including robbery)
- drug-related violence, intimidation and extortion
- disruptions to public amenity caused by drug use and dealing, and
- drug-related public health problems.¹¹⁴⁰

The Royal Australasian College of Physicians and the Royal Australian and New Zealand College of Psychiatrists is critical of the emphasis on expensive supply reduction strategies, arguing that:

*supply reduction has received and continues to receive the overwhelming bulk of resources notwithstanding the meagre evidence of relative effectiveness or cost effectiveness. Needles and syringe programs in Australia brought a benefit of almost \$2.3 billion at a cost of \$130 million.*¹¹⁴¹

The argument is not necessarily for less spending on supply reduction measures but for spending decisions to be based on evidence of effectiveness. Law enforcement concentrating on supply reduction will remain a central element of Australia's approach. However, the legitimacy of relatively costly law enforcement measures depends on the ability of police and other law enforcement bodies to show evidence of effective outcomes, including evidence of how law enforcement strategies complement and enhance the demand and harm reduction elements of the national strategy.

Dr Alex Wodak, Director of the Alcohol and Drug Service at St Vincent's Hospital, Sydney also suggests that there is a disproportionate focus on supply reduction. Dr Wodak cites research that found that 84% of spending in response to illicit drugs was directed at attempts to restrict supply, with only 6% and 10% spent on drug treatment programs and prevention respectively. Dr Wodak believes that supply reduction is a 'crude weapon' that for the most part is 'ineffective' and 'costly'. However, Dr Wodak does not directly advocate a reduction in spending on supply reduction, but rather, increased spending on drug treatment programs. Dr Wodak argues that drug treatment programs:

*stop a hell of a lot more drug dealing and drug use and crime than the police, courts and prisons do – at a fraction of the price. Yet if you want to get on [a] methadone program today, you wouldn't get on it – there are no places. ... We probably have, in numbers, a quarter to a third of people who need treatment in NSW currently in treatment.*¹¹⁴²

We received many submissions arguing that drug law enforcement strategies such as supply reduction should complement demand and harm reduction strategies. For example, one submission stated:

*Law enforcement is only one component of tackling illicit drug use in our community. These strategies must be complemented with strategies to minimise harm to individuals and the community, eg: increased funding for treatment and support services for drug users and the creation of meaningful employment opportunities for youth.*¹¹⁴³

Don Weatherburn, Director of the NSW Bureau of Crimes Statistics and Research has pointed to the tension between supply, demand and harm reduction objectives and 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 ...*¹¹⁴⁴

15.3. Drug detection dogs and harm minimisation

In introducing the Drug Dogs Act, the Government anticipated minor drug users would be caught up in operations targeting 'drug dealers and couriers', but expected police would play an active role in diverting users into drug treatment programs. During the second reading speech of the Police Powers (Drug Detection Dogs) Bill 2001, the (then) Minister for Police, the Hon. Michael Costa MLC stated:

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 the treatment of persons who are using these harmful substances on 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.*¹¹⁴⁵

Ms Clover Moore MP doubted whether drug detection dogs would effectively target dealers and couriers:

*The use of sniffer dogs in public places means that thousands of dollars in police resources are dedicated to catching recreational drug users, people with addictions and the occasional small-time dealer. ... The targeting of recreational drug users, rather than dealers and traffickers, is contrary to progressive drug policy that channels users into health services and rehabilitation.*¹¹⁴⁶

In their submission NSW Police noted that:

*There are NSW Police policies in relation to Needle & Syringe Programs (NSP), drug treatment, overdose, the Medically Supervised Injecting Centre (MSIC) and other public health initiatives. These policies provide specific direction to police not to engage in activities likely to discourage drug users from seeking drug treatment services or other support.*¹¹⁴⁷

NSW Police also noted that:

*Consistent with corporate objectives, the application of drug law enforcement, and particularly High Visibility Policing (HVP) including drug dogs in public places, is designed to deter drug offences, enhance public amenity and reduce fear. Feedback received by commands conducting HVP are positive.*¹¹⁴⁸

Many of the submissions we received suggested that the use of drug detection dogs was discordant or largely at odds with demand and harm reduction strategies.

The NSW Users & AIDS Association (NUAA) was of the view that drug detection dog operations have a negative impact on harm reduction and health services directed at drug users:

*drug dog operations conflict with the principles of harm minimisation ... [and] ... there is no evidence to show drug dog police supporting health services and significant evidence to show that drug dog police working against the aims of health services.*¹¹⁴⁹

The Youth Justice Coalition opined that the use of drug detection dogs is:

*dangerous, ill conceived and counter productive to the need to commit scarce community resources to harm minimisation strategies and rehabilitation services for people with serious drug and alcohol problems.*¹¹⁵⁰

Tony Trimmingham of Family Drug Support was of the view that the use of drug detection dogs damages the principles of harm minimisation.¹¹⁵¹

The Office of the Director of Public Prosecutions submitted that:

*the use of drug detection dogs, particularly in respect of section 7 of the [Drug Dogs] Act, appears to detract from NSW Police implementation of harm minimisation. It is acknowledged that harm minimisation involves many competing concerns, of which the detection of criminal behaviour is but one aspect. However, the data overwhelmingly shows that cannabis is the principal drug detected and that usually in small quantities.*¹¹⁵²

Redfern Legal Centre argued:

the entire premise on which drug detection dog operations are run is flawed. The statistics in the Ombudsman's Paper show that those being most affected by the drug detection dog operations are small quantity personal users (usually in possession of cannabis) and not dealers or suppliers or those further up the 'chain' of production. And it is those further up the chain that police should be focussing their resources on. They are the people profiting from the drug trade; they are manufacturing dangerous substances; they are not the ones who are physically and mentally dependent upon the illicit substance.

*We would submit that drug detection dogs should be used in operations or circumstances (eg at the airport, with customs officers, etc) where quantities of prohibited substances, beyond that of personal use, (eg traffickable or importation-size) are being targeted. A focus higher up the chain of the drug trade is in keeping with a harm minimisation approach.*¹¹⁵³

Dr Ingrid van Beek, Medical Director of the Medically Supervised Injecting Centre, felt that drug detection dog operations in Kings Cross had the potential to impact on efforts to reduce drug use and harms:

*I think the big conflict with the [drug detection] dogs is that we've had this informal understanding for the last decade or so, that in [the Kings Cross] area police would target drug supply and we [health services] would target drug users and that's been a fairly complementary sort of approach which the community has supported because by and large it is a very humane community that understands the complexity of the drug issue. The problem with the drug detection dogs is it disrupts that complementary agreement because it necessarily seems to be better at targeting drug users in possession. Drugs suppliers are way too smart to get caught out by drug detection dogs – you can see them coming a mile off – if what you do is supply drugs you keep an eye out for that sort of thing – but if you are just an occasional drug user of course you're not thinking that a Labrador's going to be around every next corner ...*¹¹⁵⁴

Dr van Beek emphasised her support for policing activity aimed at the supply of harmful drugs such as heroin and cocaine in Kings Cross:

*it would be wrong ... to expect police to stop policing supply in the vicinity, which of course is very much their duty and in itself ought not to interfere with the operation of the [MSIC] anyway.*¹¹⁵⁵

We conducted an interview with Paul Dillon, Information/Media Liaison Manager at the National Drug and Alcohol Research Centre. Mr Dillon was unable to identify any demand or harm reduction benefits associated with the use of drug detection dogs. In relation to demand reduction Mr Dillon made the following observation:

*you know this perception that drug dogs would mean that people just won't use drugs ... I mean, they don't just stop using drugs, ... heroin users don't just stop using heroin and go to TAFE. ... what they do is they transfer to another drug and often the drug they transfer to can be far more risky than their original drug of choice.*¹¹⁵⁶

15.4. Police officers and their role in harm minimisation

During the review police officers expressed a wide range of views in relation to the application of harm minimisation objectives to their work. Some police officers find it difficult to reconcile the broader aims of harm minimisation with their primary role of law enforcement:

*Harm minimisation is a strategy that probably doesn't concern us as police officers.*¹¹⁵⁷

*We are the [law] enforcement side of things.*¹¹⁵⁸

*all we can do from our part really is to stop people from having drugs ... but um, that's the only part we can play, there's lots of issues around drugs, there's the social, there's the health, there's lots of issues, but our particular issue, we can only, we obviously have to work in with all the other issues but, ... we're not social workers, we're not doctors, we're police ... we're there to do what the law tells us to do.*¹¹⁵⁹

*Harm minimisation to me is just not having drugs out there. No drugs, no problem, you've minimised it to its infinite point. And to successfully reduce it, you've gotta have legislation [where] you have to literally go out and do it with drug dogs.*¹¹⁶⁰

*Now, cannabis cautioning and things like that, might save that individual who's caught with it from getting a criminal conviction. But, with drugs and illicit use of drugs there's an associated criminal element, break and enter, stealing, prostitution, to get their drugs. By prosecuting them and giving them a criminal record, you do more to minimise the harm effect on the unseen victims.*¹¹⁶¹

*But for us, health doesn't come into it. We're strictly here to enforce the law. That's our job.*¹¹⁶²

*I don't know if there's a healthy mix between what we class as harm minimisation and reduction to what other [people's] perceptions are. Our job is to work within the legislation that's given to us.*¹¹⁶³

*I find it difficult to accept that by not enforcing particular legislation designed to reduce the amount of drugs in society it will somehow assist with harm minimisation. The use of drug dogs not only dissuades drug users from carrying prohibited drugs, but seriously impedes the capacity of drug dealers to carry out their illegal activities.*¹¹⁶⁴

*A flow-on effect [from the Drug Dogs Act] is the encouragement it gives to young people in particular, not to carry anything else that is illegal, i.e. house breaking implements, dangerous articles and weapons such as knives. This would surely minimise harm, not only to the community in general, but also to those who gravitate to carrying such items. I'm sure victims, who have been previously robbed on a train at knifepoint, would welcome the drug detection dog into their carriage. The link between violent robbery offences and the addiction to prohibited drugs is well documented. ... It would be difficult to interfere to a lesser extent with the harm minimisation approach without reducing the capacity of NSW Police to protect the community.*¹¹⁶⁵

However, a number of police officers are able to situate their law enforcement role within broad harm minimisation objectives.

*What we do can be seen as a form of harm reduction.*¹¹⁶⁶

*Enforcement plays a role in reduction for a start. These drug dog operations play a role in harm minimisation.*¹¹⁶⁷

*It's a harm minimisation by enforcing the law. Because by enforcing the law you save all the other ongoing victims, the victims of break and enter, the victims of assaults and theft that these people have stolen money and goods from, to buy the drugs that they shoot up themselves. ... So you talk about harm minimisation, harm against who? Is the victim the user of drugs who's probably just as much a victim of their circumstances, or the victim of the crimes that [drug users] perpetrate to get the drugs that they want to put into their body?*¹¹⁶⁸

Many police officers also recognised that drug use was primarily a health issue:

*Ultimately the drug problem is a health issue and so we are just in the middle of it all.*¹¹⁶⁹

*I feel that we should treat drug addiction as a health issue, but we are here to enforce the law so what can we do?*¹¹⁷⁰

*drug use particularly, I am not talking about drug supply, drug supply has to be literally dealt with as such, drug use is a health issue and the resources haven't been put into health to deal with it. All the money has gone into law enforcement to police it ... but prohibition doesn't work.*¹¹⁷¹

*The users are victims of the system themselves and they're the ones you catch. They're not really the ones you want if you want to defeat the crime. You wanna get the people who are selling [to] them. But the people we end up with are the people who are victims of the criminal justice system and victims of a social system that's let them down and doesn't support them and they're dealing with a drug of addiction and they get very little help for it.*¹¹⁷²

Some police officers noted the difficulty of treating drug use as simply a health issue:

*Yeah I think the drug problem is a health issue more so than a law enforcement issue these days. The only problem is ... the organised crime that surrounds it ...*¹¹⁷³

*But it is a health issue and it needs to be dealt with as a health issue, not just keep smacking them from a law enforcement point of view. The problem from a law enforcement point of view is we need to know what is going on. Whether it is through arrests or through intelligence because that stuff eventually collectively may lead to something bigger ... it may help us identify a break and enter offender or someone who has done a robbery or something like that.*¹¹⁷⁴

The above comments demonstrate some of the quandaries faced by police officers when carrying out drug law enforcement. They also reflect the tension between drug law enforcement on the one hand, and harm reduction on the other. A drug educator we interviewed said:

*police have an incredibly difficult job because so much of harm reduction goes against what their actual role is. Their role is to enforce the law and as a result, often it's a very very tough thing for them to cope with. ... Unfortunately there are some police whose knowledge of what harm reduction really means is quite warped and as a result I think that confuses them about what they should be doing.*¹¹⁷⁵

A senior police officer we interviewed pointed out that NSW Police has developed initiatives consistent with harm minimisation principles. The officer cited guidelines in relation to the MSIC (see below at paragraph 15.6.1.2) and other health services such as Needle and Syringe Programs ('NSP') and methadone clinics as examples of harm minimisation objectives being incorporated into operational policing. However, the officer also noted that police face:

*a dilemma ... as to whether we [NSW Police] should play a more active role in [harm minimisation]. In other words, should we be an agent for the health centre? And I'm not sure whether we should because I think we start to impose some obligations that would be difficult to meet. ... My view would be that perhaps we're moving out of our core business. Perhaps if our role were more limited to ensuring that our activities didn't interrupt access to health services or didn't disrupt harm minimisation practices ... what I think we should do, is where the health sector identify policing issues which impact adversely on harm, increase harm, we should take that into consideration and try to work to overcome those.*¹¹⁷⁶

15.5. Drug diversion programs and drug detection dogs

Drug diversion programs have the potential to reduce both direct and indirect harms associated with drug use by addressing harmful drug use behaviours of individuals.¹¹⁷⁷ NSW Police and government support for drug diversion initiatives demonstrates an understanding that:

*solutions that will be of most benefit to the community are those that can successfully divert drug users away from the criminal justice system and into treatment.*¹¹⁷⁸

There is little doubt that the use of drug detection dogs has led to an increase in the number of drug users coming to the attention of police. A large number of the users who have been detected as a result of drug detection dog operations have been young adults (18 to 29 years) who have had little or no prior contact with the criminal justice system. The challenge for police is to ensure that the new pool of drug users who are being identified by drug detection dogs are processed in a manner that is consistent with principles of harm minimisation.

NSW Police's commitment to various diversionary initiatives enables police officers to exercise their discretion in an accountable and transparent manner by diverting drug users away from the criminal justice system in appropriate circumstances. This diversion results in drug users receiving education and/or treatment for their harmful drug use. It also has the potential to lessen the impact that contact with the criminal justice system might have on first-time offenders. This issue is examined in more detail below (at paragraph 15.5.4.6).

By far the most common diversionary initiative utilised by police as a result of drug detection dog operations was cannabis cautioning, followed by juvenile cautions and warnings. We also noted that one offender was referred to the Adult Drug Court. These initiatives are discussed in more detail below (at paragraphs 15.5.1, 15.5.2 and 15.5.3).

NSW Police are also involved in Magistrates Early Referral Into Treatment (MERIT) where adults with a 'demonstrable drug problem' undertake assessment and/or treatment as a voluntary condition of bail.¹¹⁷⁹

We did not come across any specific cases of individuals being referred to MERIT as a result of drug detection dog operations. However, it is important to note that we did not examine referrals to MERIT and other diversionary initiatives in detail. It is likely that individuals participated in MERIT after being referred or encouraged to participate by police. It is also likely that individuals participated in treatment and rehabilitation programs as a condition of bail or the sentence handed down by the court.

15.5.1. Cannabis Cautioning Scheme

15.5.1.1. Cannabis cautions

All Australian states and territories now have some form of cautioning or penalty scheme to deal with people found in possession of small amounts of cannabis.¹¹⁸⁰ In April 2000 the NSW Government introduced the Cannabis Cautioning Scheme. The scheme, which is based on general police discretion not to prosecute rather than on specific legislative provisions, extended the options available to police who located small amounts of cannabis on a person:

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.¹¹⁸¹

Persons found in possession of cannabis may be eligible for a caution if:

- they are found with up to 15 grams of dried cannabis (not resin, oil or living plants) and/or equipment for the use of cannabis
- they are over 18 years old
- there were no other offences at the time the cannabis was found
- they must consent to the caution and sign the cannabis caution notice
- the cannabis was for personal use only, and
- they admit to the offence.

Other conditions that affect a person's eligibility include:

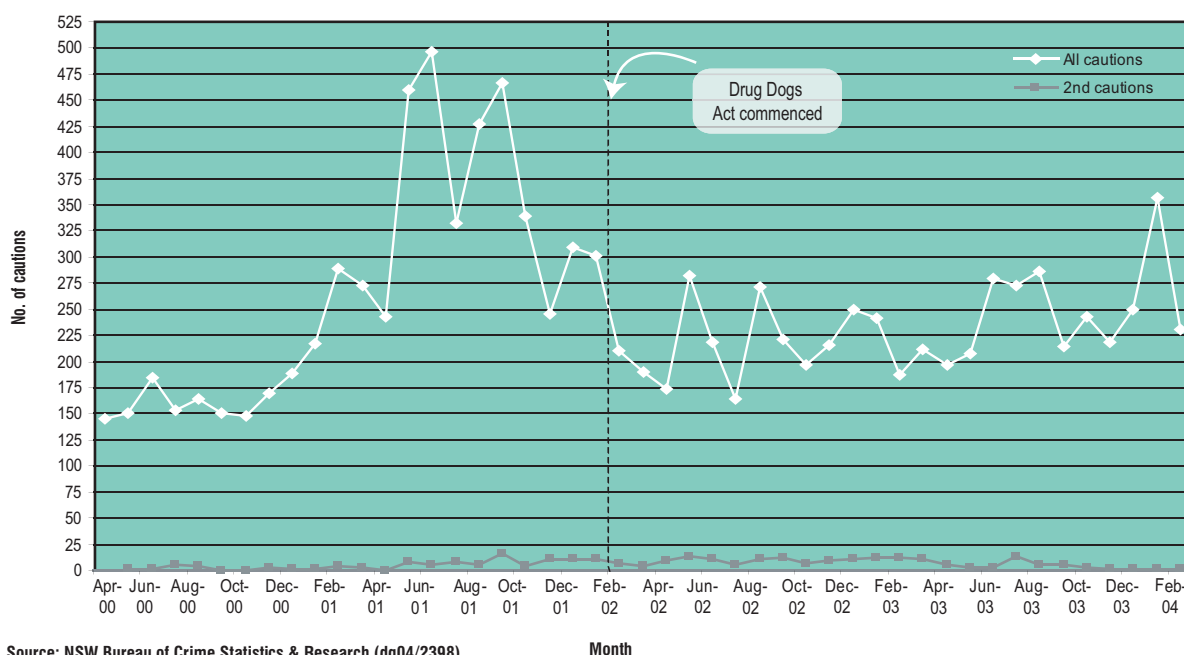
- the caution must be appropriate
- the offender cannot demand the caution – the caution is at the discretion of the police officer
- the identity of the offender must be confirmed, and
- the person must not have convictions for drug-related offences, or offences involving violence and/or sexual assault.¹¹⁸²

The 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 session on cannabis use' with the offender.¹¹⁸³

15.5.1.2. Cannabis cautions and drug detection dogs

In September 2004 BOCSAR released its review of the first three years of operation of the cannabis cautioning scheme.¹¹⁸⁴ The review found that 9,235 cannabis cautions were issued in the first three years of the scheme and that this represented less than one-third of all legal actions for minor cannabis offences.

Figure 24. 1st & 2nd Cannabis cautions issued – April 2000 to February 2004



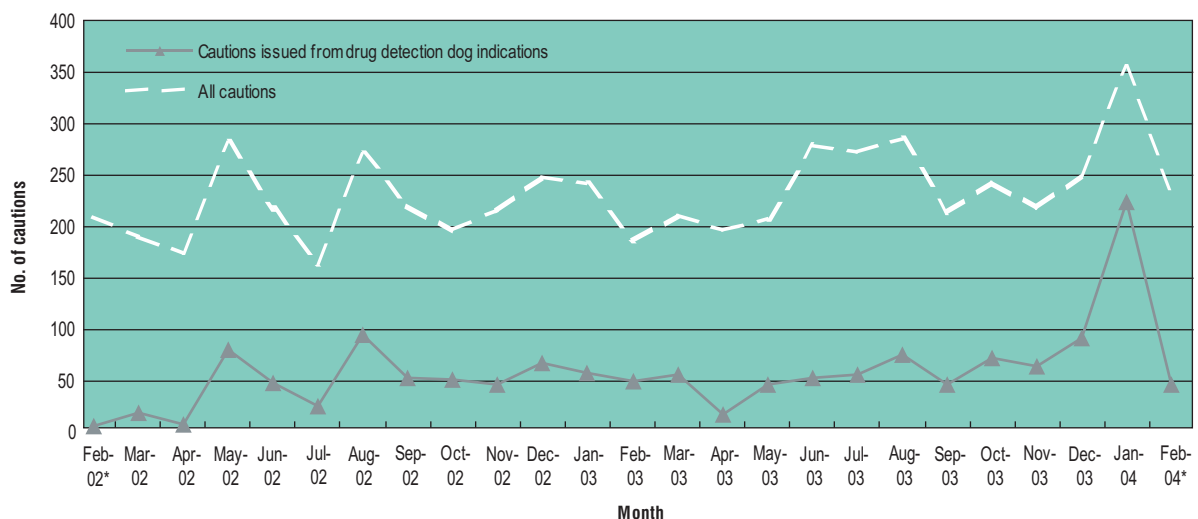
Source: NSW Bureau of Crime Statistics & Research (dg04/2398).

Month

Figure 24 shows the number of cautions issued each month from the start of the cannabis cautioning scheme until February 2004. It indicates there was comparatively high use of cannabis cautions in mid-2001, well before the introduction of the Drug Dogs Act. However, in trying to determine whether the use of the drug detection dogs had an impact on the frequency of cannabis cautioning (whether first or second cautions), it is important to note that dogs were being used by NSW Police for some time prior to the introduction of the legislation, at least since February 2001.¹¹⁸⁵ Another important factor was the introduction of the Drug Dogs Regulation permitting the use of drug detection dogs on certain public transport routes without a warrant in May 2002, leading to a significant increase in drug detection dog operations after that date.

Our analysis of Dog Unit records during the review period showed that police accompanied by drug detection dogs issued 1,466 cannabis cautions. Figures from BOCSAR show that over the same period, 5,790 cannabis cautions were issued in NSW. This indicates that cautions issued by police using drug detection dogs account for approximately 25% of all cannabis cautions issued in the state. The month-by-month comparison of all cannabis cautions and cannabis cautions issued as a result of indications by drug detection dogs is set out in Figure 25.

Figure 25. Cannabis cautions in NSW (February 2002 – February 2004)



* Figures for February 2002 and 2004 are not for full months for the drug detection dog cautions.

Source: NSW Bureau of Crime Statistics and Research (dg04/2398) & Results Spreadsheet, 22 February 2002 to 21 February 2004.

The data shows that the police use of cannabis cautioning is now a common feature of general drug detection work. In most months, police issued about 150 to 200 cautions that were not related to drug detection dog operations. It appears that the active use of drug detection dogs has significantly inflated the overall number of offenders issued with cannabis cautions. The impact of the dogs is particularly apparent in the months where there were sharp increases in cautions related to drug detection dog indications, notably May 2002, August 2002 and January 2004.

The BOCSAR review found that cannabis cautions in NSW were mostly issued for possession offences, rather than use or equipment offences, and that amounts were small with three-quarters of all amounts weighing under five grams.¹¹⁸⁶ The Results Spreadsheet also shows that cautions issued in relation to drug dog detections were generally for small amounts with 75% weighing 3.5 grams or less and more than 10% (180) weighing half a gram or less.

During our initial consultations 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.¹¹⁸⁷ There is no compulsion on police to issue a caution even if the cautioning criteria are met. While police are encouraged to caution eligible offenders, police retain the discretion to charge offenders if circumstances suggest that this is more appropriate. Police may also informally warn an offender if formal action is not deemed necessary.¹¹⁸⁸

The BOCSAR review found that cannabis cautions represented 'only 29 per cent of all formal legal actions for cannabis offences.'¹¹⁸⁹ Comparable analysis of the Dog Unit's data showed a much higher use of cannabis cautioning in relation to similar offences detected through the use of drug detection dogs. There were 2,259 formal legal actions for cannabis or other 'caution-able' items (e.g. implements to use cannabis)¹¹⁹⁰ following a drug detection dog indication during our review period. Of these, the 1,466 cannabis cautions issued represents almost 65% of all 'cannabis-related incidents' arising from drug detection dog indications. That is, compared with the overall

rate of cannabis cautioning, police working on drug dog operations were more than twice as likely to issue cannabis cautions.

The BOCSAR review notes that police sometimes experienced difficulties in issuing cannabis cautions in the field, for example caution books, drug bags and scales may not have been readily available because they are bulky items to carry around. Accurately identifying offenders in the field also presented difficulties in conducting criminal records checks.¹¹⁹¹

It is unclear why police are cautioning at a greater rate when on drug detection dog operations than in general police patrols. It may be that some of the issues noted in the BOCSAR review are less prevalent in planned drug detection dog operations. For example, police may be better prepared with the necessary caution books and scales, more people may meet the criteria when caught by drug detection dogs because there is less likelihood that they are caught committing a concurrent offence, or cannabis cautions may simply present a fast method of dealing with offenders which is an important consideration when maintaining police numbers to work with the drug detection dog and handler.

A submission from The Shopfront Youth Legal Centre applauded the fact that police appear to be using the cannabis cautioning scheme in most cases where the eligibility criteria are met. However, the legal centre also felt that those cannabis offences that did proceed to court resulted in 'little discernible public benefit.' The submission supported an extension of the cautioning criteria, for example, to ensure that one or two previous convictions for minor drug offences did not make a person ineligible for a cannabis caution.¹¹⁹²

15.5.1.3. Cannabis related incidents where a caution was not issued

The Results Spreadsheet shows that there were 793 incidents in which cannabis or related items were found but no cannabis caution issued. Amounts of cannabis found in these incidents were still generally small with 75% of recorded amounts weighing five grams or less.

Using the information in the Results Spreadsheet, we were able to confirm (see Table 23 below) that in *at least* 40% (317 of 793) of these incidents the cannabis caution guidelines would not have permitted a cannabis caution to be issued. In the 94 incidents involving young people, 90% received juvenile cautions or warnings.¹¹⁹³ In a number of the remaining 60% of incidents, it is likely that some of the other cautioning criteria not recorded on the spreadsheet had not been met. For example the person may have had prior drug convictions. While we know that in a number of instances persons eligible for cautions were not issued a caution, there is no obligation on police to issue cautions to eligible persons.

Table 23. Incidents where cannabis or related items found but no cannabis caution issued, cautioning criteria not met.

Caution criteria	No. (%) not meeting criteria n = 317
No person of interest recorded	7 (1%)
Persons under 18 years	94 (12%)
More than 15 g cannabis located	72 (9%)
Other drugs also located	144 (18%)

Note: Some incidents were ineligible according to more than one criteria.

Source: Derived from the Results Spreadsheet, 22 February 2002 to 21 February 2004.

The following are some examples of situations where, for unknown reasons, police chose to charge or issue a court attendance notice rather than a cannabis caution.

Example 1 – Field Court Attendance Notice issued

On an afternoon in 2002, police in northern NSW were patrolling a street as part of a drug detection dog operation. The drug detection dog indicated the rear of a parked car. The owner of the vehicle and two passengers were requested to leave the vehicle. Police searched the vehicle and found an empty resealable plastic bag.

Police then conducted a 'cursory search' of each person and located a plastic bag containing cannabis on one man. The bag weighed ten grams and the man stated that the cannabis was for personal use. The man had no prior cannabis cautions and no criminal history.

The man was issued an FCAN. He pleaded guilty to the offence and received a \$100 fine.¹¹⁹⁴

Example 2 – Field Court Attendance Notice issued

On a Saturday night in 2002, police in northern NSW were conducting a drug detection dog operation in a hotel. The drug detection dog indicated a woman in her late thirties and when police searched the woman they found 2 grams of cannabis in a film canister.

The woman told police that the cannabis was for personal use. Police issued her with a field court attendance notice.

At court it was revealed that, after losing her leg some years earlier in an accident the woman had begun using cannabis for relief of chronic pain. The woman pleaded guilty to the offence. The magistrate wondered aloud why police had not issued a cannabis caution to the woman who had no prior convictions and no prior cannabis cautions.

The matter was dismissed under section 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*.¹¹⁹⁵

Example 3 – Charged

In April 2002, police were patrolling an inner Sydney hotel with a drug detection dog. Just before midnight, the dog indicated a woman in her late twenties. In the woman's shoulder bag police found two rolled cigarettes filled with cannabis and some loose cannabis and tobacco weighing a total of 3.14 grams.

The woman was interviewed and told police that she smoked the cannabis to help her sleep at night. She had no prior convictions or cannabis cautions.

The woman was charged with possession and pleaded guilty. She was fined \$150.¹¹⁹⁶

On other occasions when we inquired further into incidents we found that police had reason to take more formal action with offenders. In one stark example, police charged a man for the possession of one cannabis seed and he was fined \$100. Further investigation into the matter revealed that the man had close to 80 prior convictions, some of which were drug related.¹¹⁹⁷

While there are some people who are currently not being cautioned who may benefit from this option, overall police are making appropriate use of the cannabis cautioning scheme when working with drug detection dogs.

15.5.1.4. Harm minimisation, cannabis cautioning, and drug detection dogs

One of the aims of diversion programs like the cannabis cautioning scheme is to reduce the social harms that are associated with minor drug use by having a criminal record.¹¹⁹⁸ During the review period there was a downward trend in the number of people who were proceeded against in court for possession or use of cannabis.¹¹⁹⁹ This continued the downward trend which began when the cannabis caution scheme was introduced. The high utilisation of cannabis cautions by police using the drug detection dogs appears to have minimised any potential negative social impacts which may have resulted if a high proportion of those apprehended obtained a criminal record.

However, the rate of formal legal actions (cannabis cautions and other legal actions combined) per 100,000 population for minor cannabis offences has increased since the introduction of the cannabis cautioning scheme. According to the BOCSAR review, 'such increases are not likely to reflect increased cannabis use amongst the community.'¹²⁰⁰ Rather, in addition to a general move away from informal cautioning because of concern about police accountability and allegations of corruption, BOCSAR states that:

*Much of the increase in formal actions can then be seen to be a direct result of the increase in the proactivity of police and an increase in the number of searches conducted.*¹²⁰¹

Whether this increased rate of contact with the criminal justice system contributes positively to harm minimisation is unclear. While the BOCSAR review found that only a small percentage of people cautioned took up the opportunity to contact the ADIS (Alcohol and Drug Information Service) help-line, each person cautioned received information about the legal and health consequences of their cannabis use.

One drug educator we spoke to, while acknowledging that few in his field would share his view, commented that police interventions in relation to young people using cannabis could potentially be positive from a harm minimisation perspective:

I actually don't see it [the increased number of cautions] as being a bad thing. A young person in particular ... receiving a caution for cannabis. ... They're not going to get a ... criminal record as a result of it. And what we know is that any intervention can make a difference. So [for] a young person who does have that, it can go, "Gee, I got caught." That's enough for them maybe not to do it again. I think it really depends on the entire experience. I think if it's an experience that isn't public, jolting, offensive [it might have harm reduction benefits].¹²⁰²

15.5.2. Options for young offenders

15.5.2.1. Young Offenders Act 1997

The *Young Offenders Act* creates a system of warnings, cautions and youth conferences as a pre-court diversionary program. In order to participate in the scheme juveniles (under 18 years and over 10 years of age) must make admissions to the alleged offence/s and agree to participate in the scheme.

The *Young Offenders Act* generally applies to less serious offences committed by juveniles who do not already have a substantial criminal record. It does not apply to:

- serious offences such as robbery
- traffic offences (if the young person was old enough to hold a licence or learner licence at the time)
- offences resulting in the death of any person
- sexual offences
- apprehended violence offences (e.g. stalking, breach AVO), or
- drug offences (except for possession, cultivation or use of small amounts).

The *Young Offenders Act* provides that juveniles are entitled to legal advice before they make admissions, receive a caution, or participate in a youth justice conference.

A warning involves police recording the giving of a warning but not the name of the young person. Warnings are generally utilised in relation to minor summary offences such as swearing in public.

A caution is a formal, recorded sanction, but does not constitute a criminal conviction. A young person can only be cautioned if he or she admits the offence and agrees to be cautioned. Cautions are usually utilised in relation to more serious offences such as stealing or property damage. The fact that a young person already has a criminal record does not preclude them from being cautioned. Cautions include a 'cooling off period' of between 10 and 21 days during which the young person can change his or her mind about whether they wish to proceed with being cautioned.

A youth justice conference is the most formal diversionary intervention. A conference establishes a process for parties, including the offender, to meet and agree on an appropriate means of restitution for the offence. The decision to instigate a conference can be made by the Director of Public Prosecutions (DPP), a court or a NSW Police Specialist Youth Officer. A conference can only be held if the young person admits the offence and agrees to attend. It cannot impose a more severe outcome than a court would. The Department of Juvenile Justice administers conferencing and is ultimately responsible for deciding whether a conference should proceed.

Under the *Young Offenders Act*, possession or self-administration of no more than a 'small quantity' of drugs may be dealt with by warning, caution or conference. The *Drug Misuse and Trafficking Act 1985* defines a 'small quantity' as follows:

- cannabis – up to 15g
- ecstasy – up to 0.25g
- heroin or meth/amphetamine or cocaine – up to 1g
- LSD – up to 4 'trips' or 0.0008g

Cultivation or possession of prohibited plants may also be dealt with under the *Young Offenders Act* if the amount of the plant is no more than half the 'small quantity' (i.e. 2.5 plants). A matter involving more than this amount may in exceptional circumstances be dealt with, as long as the amount is less than the small quantity and dealing with the matter under the Act would be in the interests of the young person's rehabilitation.

15.5.2.2. Young offenders apprehended during drug detection dog operations

Table 24 details the variety of actions that police took when a drug detection dog indicated upon a juvenile.

Table 24. Analysis of indications pertaining to juveniles

Result of arrest	Number	Cannabis	Meth/ amphetamine	Ecstasy	Polydrug	Implements	Residual
CAN ¹²⁰³	3	2		1			
FCAN ¹²⁰⁴	4	4					
Cannabis Caution	28	28					
Charge	4	2		1	1		
Warning	11	6		1		2	2**
Summons	2	1	1				
Further investigation	1		1				
Bail CAN	2	1		1			
Juvenile Warning	19	18				1	
Juvenile Caution	81*	69	3	6		3	
SUB TOTAL	155	131	5	10	1	6	2
No action	559						
TOTAL	714						

* Two individuals aged 23 and 45 are recorded as having received a juvenile caution (one for possess cannabis, one for possess meth/amphetamine)

** One individual is recorded as 'residual admit'

Source: Derived from the Results Spreadsheet, 22 February 2002 to 21 February 2004.

Table 24 shows that the majority of indications (559 of 714, or 78%) resulted in no action being taken by police because no prohibited drugs were located during the search following the indication.

Where a prohibited drug was located it was mostly cannabis (131 of 155 incidents).

The most common action taken by police was a juvenile caution, which accounted for 52% (81 of 155) of incidents. However, it should be noted that 28 juveniles received an adult cannabis caution rather than a juvenile caution. In all, 70% (109 of 155) of juveniles received a caution when police took some action. Police also issued a total of 30 warnings to juveniles. Thus, in almost 90% (139 of 155) of incidents where a juvenile was found in possession of a small quantity of a prohibited drug or an implement, police issued a caution or a warning.

15.5.3. Drug courts

During the two-year review period we were only able to identify one individual detected during a drug detection dog operation who was referred to the Adult Drug Court.

We visited the Adult Drug Court to observe its operation first hand. During our visit we spoke to the senior judge and the dedicated staff involved in the care and management of participants. We also sat in on an assessment team meeting, which considers the progress of each participant due in court that day. The assessment team is comprised of the judge and representatives from the Director of Public Prosecutions, Justice Health, Probation and Parole Service, Legal Aid, and various area health service workers who provide support and counselling to participants.

Case study

Adult Drug Court participant

In late 2003, a 23-year-old male with a history of drug and property-related offences was apprehended with 3.6 grams of meth/amphetamine and 60.3 grams of cannabis during a drug detection operation at a western Sydney railway station. The male was charged with two counts of possess prohibited drug. He was convicted in the Local Court and given an eight-month sentence of imprisonment, which was suspended on condition of him entering into a bond to be of good behaviour.¹²⁰⁵

A couple of months after being given the suspended sentence, the offender was charged with further drug offences, goods in custody, and possession of a weapon (baton). These further offences constituted a breach of the bond that the offender was serving for the initial drug offences.¹²⁰⁶

The Local Court that determined the initial drug charges revoked the bond and referred the offender to the Adult Drug Court due to the fact that he appeared to be drug dependent and facing a sentence of imprisonment for the offences that he had committed. At the point of referral the offender was refused bail and remanded in custody to undergo drug detoxification and assessment of suitability for the Adult Drug Court program.

The offender was assessed as being suitable for the program and was successful in gaining a place after a ballot. Upon acceptance into the program the offender pleaded guilty to all offences and was given a sentence of 24 months imprisonment, which was suspended when the offender agreed to participate in the intensive Adult Drug Court program.

At the time of writing the offender had progressed to Phase II of the program. Importantly, he had not re-offended and was attending regular counselling, group therapy and twice-weekly urine analysis. However, he had spent some time in the Adult Drug Court Unit (at Silverwater Correctional Complex) due to non-compliance with the program, which included both admitted and non-admitted drug use, failure to attend court for urine analysis and failure to attend certain counselling and group therapy sessions.

The man currently attends court on a fortnightly basis where the court assesses his progress. Overall he appears to be benefiting from the program notwithstanding that his entrenched drug use still requires constant vigilance. On the day we visited the court the judge remarked in open court that the offender was looking healthy now that he was largely abstaining from drug and alcohol use. The judge and the offender also had a frank discussion about recent admitted drug use and the offender was praised for his honesty whilst at the same time being reminded that participation in the program was an alternative to full-time custody. The offender also reported that he was now working full-time in the construction industry and that he had organised his twice weekly urine samples outside normal hours given his work commitments.

Clearly one indication of success of the program is the fact that the offender appears to have broken the cycle of offending that he was previously involved in. Further, his drug and alcohol issues are being addressed in a supportive environment, which also looks at other underlying issues that may have been contributing to the offender's drug use behaviours.

The Adult Drug Court is an example of a demand and harm reduction initiative that results in many health and social benefits for participants. Senior Judge Dive noted that there are also numerous other benefits for the community such as reduced crime and a reduction in destructive drug use that may have been impacting negatively on families and friends of participants. Further, the underlying issues that may have led to drug using behaviours of participants are addressed. Therefore, even if a participant does not complete the program, they may take away a renewed sense of well-being and self-esteem as well as other skills gained during courses which are offered as part of the program. For example, a participant may gain computer, literacy or workplace participation skills whilst participating in the program.

15.5.4. Cautioning discretion for minor possession offences

The foregoing discussion demonstrates that NSW Police are involved in a number of drug diversion programs consistent with harm minimisation objectives. However, other than the cannabis cautioning scheme, few of these programs appear to be accessed by the growing number of individuals detected by drug detection dogs. This is perhaps because the drug diversion programs offered in NSW do not seem to effectively cater for small time users of drugs other than cannabis.

Although a 12-month trial of a program aimed at diverting these drug users into treatment commenced in July 2000 as a drug summit initiative, no scheme is currently operating in NSW.

The introduction of frequent drug detection dog patrols in NSW may present an opportunity to re-consider the merits of conducting a similar trial.

15.5.4.1. Background

Some form of cautioning or pre-court diversion scheme for small amounts of drugs other than cannabis currently operates in all Australian states and territories except NSW and Queensland.¹²⁰⁷ Police in the United Kingdom also have provisions allowing formal cautioning and diversion to treatment of people found in possession of small amounts of drugs other than cannabis.

Two main advantages of cautioning people rather than prosecuting them through the courts are often advocated:

*Firstly, cautioning is a cheaper and more efficient way of dealing with offenders because offenders who are cautioned do not appear before a court (unless they breach conditions attached to a caution). Secondly, cautioning is seen as an effective strategy for reducing recidivism rates, in part because it helps to avoid minor offenders being labelled and stigmatised as a result of acquiring a criminal record.*¹²⁰⁸

In the case of drug offenders, a cautioning system combined with other interventions may 'assist drug offenders in overcoming their drug problems and prevent drug use leading to other criminal offences.'¹²⁰⁹

While many of the drug cautioning programs in Australia have yet to be evaluated, the pilot of the Victorian diversion program was evaluated in 1999. The Victorian diversion program is based on the notion that:

*Targeting early stage illicit drug users with appropriate education and treatment may prevent their drug use becoming entrenched.*¹²¹⁰

The 1999 evaluation of the pilot program found that police, clients (offenders) and other agencies showed considerable support for the program and that police reported a reduction in administrative time preparing briefs of evidence.¹²¹¹ The evaluation also found that the program offered a fast response which capitalised on 'the shock value of the apprehension [by police]' and provided motivation for the offender to take part in the counselling.¹²¹² Ultimately the evaluation recommended state-wide implementation of the pilot and this resulted in the existing Victorian scheme.

The Australian drug cautioning and diversion schemes are largely funded through the Council Of Australian Governments (COAG) National Illicit Drug Strategy. Commonly, the programs require that:

- an eligible person is found in possession of a small amount of a drug or drugs
- rather than being dealt with through the courts the person is diverted by police into some form of assessment of their drug use, treatment or education, and
- non-compliance is dealt with by referring the person back to police to determine what (if any) further action is required.

Implementing recommendation 6.8 of the *1999 NSW Drug Summit*, NSW Police trialled a scheme to divert some minor drug users into treatment rather than the court system. The trial was known as 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.

The program was trialled in two areas of NSW for 12 months and applied to cannabis resin and oil, cocaine, heroin, ecstasy, meth/amphetamine, LSD and implements to use drugs. The scheme provided police with another tool to deal with minor drug offenders and involved an exercise of discretion in a similar manner to the cannabis cautioning scheme.

However for a range of reasons, including problems with the criteria of the trial and the simultaneous introduction of other drug diversion programs in the trial areas, the trial was not extended beyond the initial 12 months. Police identified a number of limitations in the conduct of the trial, particularly in regard to the eligibility criteria which resulted in very few offenders participating in the trial.¹²¹³

The fact that few minor drug offenders in the trial locations met the very strict criteria for the trial mitigated against its successful introduction across NSW. However, the frequent use of drug detection dogs may have changed the context

in which a similar diversion program could now operate. This may alleviate some of the difficulties experienced with the DOCTP criteria if any future trial of a similar scheme were conducted. We discuss some of the criteria below, in the context of a review of court outcomes for persons charged with possession of small amounts of drugs.

15.5.4.2. DOCTP criteria and charges following drug detection dog indications

Concurrent offences

In the trial, offenders were ineligible to participate in the DOCTP scheme if they were found committing another offence at the time they were found in possession of the drug. Without the use of drug detection dogs, police are unlikely to apprehend people solely on the basis of their possession of a drug – that is, police are likely to be investigating another offence when they discover that a person is also in possession of a drug. For example, a shoplifter may be searched by police and found carrying a small amount of meth/amphetamine. The stealing offence would have precluded the shoplifter's involvement in the DOCTP diversion program. Some police felt that this 'no concurrent offence' criteria was inappropriate and excluded too many offenders who would potentially benefit from referral to treatment under the scheme.

It may be, however, that with the use of drug detection dogs, many more offenders would now be likely to meet the criteria. As we have seen throughout this report, drug detection dogs allow police to apprehend people solely based on their possession of very small amounts of drugs. In most cases where drugs were located by drug detection dogs, only one offence was detected by police, that is, possess prohibited drug. For the two-year review period, a concurrent drug offence was detected in only 6% (169) of drug detection dog incidents where a drug was located.¹²¹⁴ Almost three-quarters (124) of these offences involved cannabis and one other drug being detected. In only a very small number of incidents other offences, such as possession of a knife, were detected.

Criminal history

Many offenders were also excluded from participation in the DOCTP trial because they had previously committed drug-related and non-drug related offences. Again, the merits of the criteria were a matter of some discussion when the trial was evaluated.

In Chapter 13 'Targeting drug supply' we found that almost three-quarters (72%) of those charged with supply prohibited drug were first-time offenders who had no prior convictions. These offenders were predominately younger people with a median age of 23 years and the average age was 24.6.

Many of those charged with less serious offences also had no prior convictions. In our 'other drugs' transcripts audit we found that 46% (11) of people had no criminal history at the time the matter went to court. A further 21% (5) had a criminal history which was not drug related.¹²¹⁵ We were unable to effectively examine the criminal histories of all persons on whom drugs were found as a result of indications by drug detection dogs.

Drug amounts

Another factor which excluded many offenders from the DOCTP trial was the criteria that only offenders caught with extremely small amounts of drugs were eligible to participate in the scheme. As a point of comparison, the amounts involved represented around a sixth of the amounts set out in the Victorian diversion scheme. For example, offenders caught with more than half a gram of meth/amphetamine were excluded from the NSW trial while the threshold was 3 grams in Victoria. Again some police have questioned the appropriateness of setting such low drug amount thresholds.

In our examination of 'other drug' transcripts we found that amounts involved were very small though often larger than the amounts specified in the original DOCTP trial. The following are the median amounts of drugs located for the main drug types involved in these matters:¹²¹⁶

- meth/amphetamine: 1.2g
- cocaine: 1.6g
- ecstasy: 0.5g

Overall, as noted in Chapter 6 'Overview of results', median amounts of 'non-cannabis' drugs located by the drug detection dogs were very small. For example, a median amount of 0.8 grams for meth/amphetamine, one gram for ecstasy, and one gram for cocaine. The Results Spreadsheet also shows that a total of 51 indications of meth/amphetamine, ecstasy or cocaine were below the amounts set out in the original DOCTP trial.¹²¹⁷ However, this includes any packaging weighed at the scene of the detection and without packaging more incidents may have fallen below the threshold.

15.5.4.3. Analysis of non-supply transcripts

As part of our review of the Drug Dogs Act we analysed a sample of court transcripts not related to supply offences in order to better identify outcomes for and profiles of persons found with small amounts of drugs after a drug detection dog indication. This sample was taken from incidents which occurred in the first 12 months of the review period.¹²¹⁸ We looked at 80 court transcripts or approximately 22% (80 of 370) of all matters proceeding to court which did not involve 'deemed supply' charges. The people involved in these matters were apprehended by police between 22 February 2002 and 15 February 2003.

Although most persons detected carrying cannabis were issued cannabis cautions, a substantial group of those found carrying cannabis were dealt with more formally. Of the 80 'non-supply' matters we examined, 70% (56) related to persons solely in possession of cannabis and 30% (24) related to persons found with other drugs, sometimes in addition to cannabis. The types of drugs found in our sample of transcripts is set out in Tables 25 and 26 below.

Table 25. Sample of court transcripts: drugs types

Drug	Number of transcripts examined	Percentage of all transcripts examined
Cannabis only	56	70%
Other drugs	24	30%
Total	80	100%

Source: Court Transcripts and COPS.

Table 26. Other drugs transcripts

Breakdown of 'other drugs'	Number of transcripts examined	Percentage of 'other drugs' transcripts examined
Meth/amphetamine	10	41.7%
Cannabis & meth/amphetamine	5	20.8%
Cannabis & ecstasy	1	4.2%
Cocaine	2	8.3%
Ecstasy	4	16.7%
LSD	1	4.2%
Rohypnol	1	4.2%
Total	24	100%

Source: Court Transcripts and COPS.

The people in our sample ranged from 19 to 55 years of age. Those found in possession of cannabis only were slightly older (median age 30 years) than those found in possession of other drugs (median age 27.5 years). Of the 24 people found with drugs other than cannabis, 22 (92%) were male and 2 (8%) were female. Of the 56 people found with cannabis, 50 (89%) were male and 6 (11%) were female.

15.5.4.4. Penalties received by people found in possession of drugs other than cannabis

Every person in our non-supply transcripts sample either pleaded or was found guilty in court.¹²¹⁹ Of those found with 'other drugs', the majority (58%) received a fine of between \$100 and \$800. A further 33% received a 'section 10 dismissal'¹²²⁰ which resulted in no conviction being recorded, in some instances subject to good behaviour for a specified period. None of the 'other drugs' matters resulted in a custodial sentence.

It appears that the vast majority of persons dealt with by the NSW courts for minor drug possession offences are not referred to any drug education, treatment or counselling as part of the justice process. In our transcript sample, of those found with other drugs, only one person was referred to a counselling or drug and alcohol program.

We also examined sentences for possession of major drug types between April 2002 and March 2004 on the Judicial Information System Research System (JIRS) database (which is maintained by the Judicial Commission of NSW) and found that for heroin, cocaine, meth/amphetamine and ecstasy the most common sentence was a fine and a substantial proportion of offenders had no conviction recorded.¹²²¹

- Heroin: 62% of sentences were fines, 13% no conviction recorded. (n = 730)
- Cocaine: 57% of sentences were fines, 26% no conviction recorded. (n = 141)
- Meth/amphetamines: 61% of sentences were fines, 20% no conviction recorded. (n = 1181)
- Ecstasy: 44% of sentences were fines, 47% no conviction recorded. (n = 431)

Interestingly, we also found that the number of sentences for almost all the main drug types decreased between April 2000 and March 2002 and April 2002 and March 2004.

The exception to this was ecstasy. Sentences for possession of ecstasy increased by 162 to 431 in the 2002-04 period. This is an increase of 60%. It is worth noting that during the review period ecstasy was located on a person as a result of a drug detection dog indication in 226 incidents. Although the sentencing and detection figures are not directly comparable, this suggests that a significant proportion of all ecstasy possession offences since the introduction of the Drug Dogs Act are a result of drug detection dog indications.

15.5.4.5. Police and community responses

In our discussion paper we raised the possibility that, 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,

there may be scope to consider extending police discretion to issue cautions to persons found carrying very small quantities of drugs other than cannabis.

While many submissions made no direct comment on this idea, a number were positive about diverting minor drug offenders from court.

In its response to our discussion paper, NSW Police made clear that currently adults may only be cautioned in relation to possession of less than 15 grams of cannabis leaf but gave no direct response to the idea of an extended police discretion to caution.

A number of organisations expressed positive views about extending a cautioning system to other drugs.

Redfern Legal Centre noted that diversionary schemes can divert minor offenders from detention where they are 'exposed to much more serious and dangerous criminal elements'. The legal centre continued:

*Diversionary schemes that involve a person in educational and group therapy (and other rehabilitative practices) are a sensible response to the drug problem. They allow a person to learn that drug taking can lead to health, financial, criminal and family problems, even where initially the drugs are small quantity and used recreationally.*¹²²²

The Office of the Director of Public Prosecutions (ODPP) commented that there was 'scope for means similar to cannabis cautioning and/or court infringement notices for small amounts of drugs'. The submission noted a particular advantage in the time and cost savings to police, courts, the Division of Analytical Laboratories and the ODPP that would result from this type of scheme.¹²²³

The Shopfront Youth Legal Centre also supported the extension of a cautioning or similar scheme to drugs other than cannabis:

*We also believe that consideration should be given to expanding the Criminal Infringement Notice Trial¹²²⁴ to adults in possession of small amounts of prohibited drugs. Judicial Commission statistics show that the overwhelming majority of defendants sentenced by courts on possession charges are dealt with by way of fine.*¹²²⁵

The Police Association of NSW, while acknowledging that 'powder drugs' were particularly addictive, also took the view that on-the-spot fines for minor drug possession could save police and courts many hours that would ordinarily be spent prosecuting such offences. Savings could then be used to better equip police and allow for greater police deployment.¹²²⁶

We also sought the views of police, health professionals and other stakeholders on this topic in interviews and focus groups. Views expressed by police were mixed. Some police felt that a cautioning system for drugs other than cannabis was inappropriate because drugs such as ecstasy and meth/amphetamines were too dangerous and/or that a cautioning system might send out the wrong message to the community that such drugs were safe:

I think it's putting the message out there that it's OK to have a hit or two or it's OK to have some coke [cocaine] or it's OK to have a bit of speed ... we shouldn't be, like, supporting something like that 'cause you know, someone does take a tablet and they could be a bad batch and they die.¹²²⁷

It would send the wrong message.¹²²⁸

Others were uncomfortable with extending their discretion to include a cautioning option for other drugs and felt that such decisions were better left to the courts.

I suppose our job is to put offenders before the court and let the court make their decision.¹²²⁹

I prefer to leave it to the courts to decide. We're doing our job as law enforcement – they've broken a law, we take action upon it. They go to the court [and] the magistrate then can decide if he is going to give them a, you know, no convictions record and give them a warning. I don't believe we should have that power.¹²³⁰

Some police were supportive of the inclusion of another option or tool at their disposal to deal with some minor drug offenders:

it'd be another tool that we could use.¹²³¹

I haven't got a problem with it.¹²³²

Seems fair to me.¹²³³

Health professionals were more consistently positive in their response to the notion of a cautioning or pre-court diversion program for people found in possession of small amounts of drugs other than cannabis:

Well look I think it's a fantastic program because I guess what we've found is that any strategy that really involves young people avoiding law enforcement, avoiding corrections and ... I guess the criminal justice system ... tends to be associated with much better outcomes for the young people.¹²³⁴

Benefits would be huge and the costs and negatives would be minor.¹²³⁵

I think what we know about brief intervention, or any sort of intervention is that they DO have an impact on some people. And, to stop people getting involved in the criminal justice system for drug use I think is really, really important.¹²³⁶

Some health professionals and drug user advocates expressed concern that appropriate diversion options be developed for individual drug users and that a blanket approach would not be effective:

I'm a clinical psychologist and I work with people with drug related problems to try and reduce their problems by reducing their use, stopping or other things, so I certainly know that there are lots of people who do experience significant health problems associated with their use and people can get dependent on drugs. But data from a number of sources confirms that the vast majority of people that use drugs don't have the kind of problems that you need treatment for. For example the National Survey of Mental Health and Wellbeing showed that only about 1 in 4 people who had used an illicit drug more than 5 times in the previous year had a 'drug use disorder' in that period.

It's not true to say that just because these drugs are illegal, therefore, if someone's using them they need treatment. Because, it would be as if saying that if you drink coffee or if you use alcohol or smoke cigarettes that you necessarily ought to be treated.

Now, while few of us would argue against diversion over incarceration for drug offenders, there's a real danger with diversion schemes that we're actually forcing people into treatment who don't want it, aren't ready for it and probably don't need it ... While evidence suggests that coercive treatment is no worse than voluntary in terms of outcomes, it is important that a person's early treatment experiences don't make it less likely that they will seek treatment the next time they get into difficulty. So if we are to have mandatory diversion schemes for cannabis, party drugs or others, we need to make sure that there is appropriate assessment and the intervention offered is tailored to their drug use and doesn't waste limited and valuable treatment resources and put them off treatment in the future.¹²³⁷

A spokesperson for the Australian Injecting and Illicit Drug Users League commented that:

The problem with it, yeah, it assumes that people are problematic drug takers, when the vast majority of people that are actually carrying small quantities of drugs aren't problematic drug takers.¹²³⁸

15.5.4.6. Impact of criminal justice system on first-time offenders

It is a well-established fact that '[t]he majority of people who commit crimes only come into contact with the criminal justice system for relatively minor offences, often committed when they were young' and that '[m]ost will never re-

offend'.¹²³⁹ As we noted in Chapter 13 'Targeting drug supply', 73% of persons charged with the more serious offence of supply during the review period had no previous conviction. Further, the median age of such persons was 23 years. The majority were apprehended at dance parties in possession of a traffickable amount of ecstasy (0.75 grams or more), and the evidence in over 60% of such cases indicated they were supplying the drug to friends or partners. The profile that emerges is of a young ecstasy and related drug users who do not view themselves as criminal offenders but who as a result of drug detection, will inevitably find themselves being processed through the criminal justice system.¹²⁴⁰ The purpose of this section is to consider the potential impact of this processing.

Official criminalisation

The term 'official criminalisation' refers to the systematic process that unfolds between the point when a person is apprehended for a criminal act and the point when the matter is resolved.¹²⁴¹ Being approached and questioned by police, arrested and detained, finger-printed and photographed, and formally questioned and charged are all elements of this process.

Official criminalisation has been shown to have a stressful impact on the individual at the centre of the process. Shame, anxiety (caused, for example, by worry over who will find out about the offence and the potential impact of acquiring a criminal record) and disruption of usual routine (as a result of needing to attend court, for instance), are all potential by-products. One study¹²⁴² that examined the personal experiences and subjective responses of detected cannabis users, for instance, found a third of subjects thought 'the worst thing about the whole experience' was the aspect of official criminalisation, 'and usually related to the conduct of the police during the arrest or at the station'.¹²⁴³

In other words, it was the *process* rather than the ultimate outcome (a finding of guilt and subsequent conviction, for example) that caused the most stress to the subjects in the study. The significance of this is the implication that even if a person is found not guilty of an offence, or the charge is withdrawn, having come into contact with the criminal justice system may still harm them. As we noted in Chapter 13 'Targeting drug supply', two-thirds of supply charges laid during the review period were ultimately withdrawn at court, usually after a number of court appearances.

Social criminalisation

Social criminalisation follows on from official criminalisation and involves the stigmatisation of an individual based on their contact with the criminal justice system. The imposition of a criminal record is the most salient marker of this stigmatisation. The Australian Law Reform Commission recognised the negative consequences for individuals possessing a criminal record in a 1987 report that recommended the introduction into Australian jurisdictions of spent convictions legislation.¹²⁴⁴

Research has demonstrated that a criminal record can be particularly detrimental in terms of a person's access to employment.¹²⁴⁵ Significantly, a person does not have to be convicted of an offence to have a criminal record. A finding of guilt that does not result in a conviction but is dealt with by way of a good behaviour bond, for instance, may in some circumstances appear on a person's criminal record. The Australian Law Reform Commission has noted that '[i]t is not only the fact of a conviction that leads to prejudice. Having been arrested for an offence, or even only having been under suspicion of crime, might be enough for some people to form an unfairly adverse judgment about a former offender'.¹²⁴⁶

Employment discrimination

In December 2004 the Human Rights and Equal Opportunity Commission released a discussion paper about employment discrimination on the basis of a criminal record. In recent years it has received numerous complaints on these grounds. The Commission notes that some professions and occupations prohibit by law or regulation the employment of persons with certain criminal records, and that '[e]ven where there is no explicit limitation on hiring a person with a criminal record, employers may perceive that those persons pose a higher risk of dishonesty, unreliability, irresponsibility or undesirable character'.¹²⁴⁷

Research indicates that employers prefer not to hire a person with a criminal record if given the chance to hire someone who does not have such a record. The Commission makes the point that the impact of a criminal record on job prospects and professional opportunities is 'of particular concern' for young people at the beginning of their working lives as well as for Indigenous people, whose over-representation in the criminal justice system is paralleled by an over-representation in unemployment figures.¹²⁴⁸

One of the more insidious effects of employment discrimination on the basis of a criminal record is recidivism, which may occur if a person comes to feel that they are 'hopelessly tarnished by their past and that there is no point in applying for a job'.¹²⁴⁹

Others effects of having a criminal record

A related effect is that having a criminal record can impact on the treatment a person receives if they subsequently encounter the criminal justice system at a later date:

*Anyone with a criminal record is at a disadvantage in subsequent criminal proceedings: a criminal conviction may influence a police officer to lay a charge; it may be grounds for denying bail; it can influence a crown attorney to proceed by way of indictment rather than by summary conviction; it may be raised to impeach the suspect's credibility as a witness; and it may result in more severe penalties as dictated by various criminal statutes.*¹²⁵⁰

Possessing a criminal record can also create potential barriers to overseas travel or lead to the cancellation of an individual's residency visa and deportation from Australia.

Weakening of respect for the criminal justice system

Apart from the cost to the individual of official criminalisation, a further, potential effect is 'a weakening of respect for the law and police on the part of otherwise law abiding people'.¹²⁵¹ Many drug users, particularly first-time offenders who are found in possession of a small quantity of drugs, do not perceive their behaviour as criminal or otherwise problematic. An evaluation of the Victorian Drug Diversion Pilot Program found that such individuals:

*tended to be shocked at being picked up by the police. They were scared of the consequences and were grateful they were not charged. These people were perceived as being generally naïve and had limited understanding of the consequences of using an illicit drug.*¹²⁵²

The authors of the evaluation note:

*The shock in some circumstances ... reflected a general normalisation of illicit drug use in some sections of the community. One person found it difficult, for example, to understand that possessing a number of ecstasy tablets could lead to a charge of trafficking.*¹²⁵³

This normalisation may lead some people to believe that 'the enduring consequences of a criminal conviction are out of step with the seriousness of the offence'.¹²⁵⁴ In turn, this view may support the attitude that the law is irrelevant and unfair. As the police are responsible for upholding the law, another outcome might be the erosion of police public relations. In their submission to our review, Redfern Legal Centre also noted that a punitive, criminal approach to drug offences risks further marginalising minority groups in the community. Discouraging these groups from seeking accurate information and/or help concerning drug use is another possible consequence of such an approach.

A question that inevitably arises, then, is whether:

*the enforcement of the law against non-dependent infrequent users of a drug, primarily as a deterrent, [outweigh] the negative impacts such as the costs of enforcement, the impact of a criminal record and the marginalisation of a large number of citizens.*¹²⁵⁵

Economic costs associated with criminal processing.

Processing drug offenders through the criminal justice system incurs multiple costs. These include costs associated with policing, court time, attendance at court and legal representation. It is difficult to reliably estimate such costs.¹²⁵⁶ One 1995 study concluded that 13% of all police and criminal justice resources in Australia were devoted to cannabis offences alone.¹²⁵⁷ Most of these costs are borne by the state and as such they divert fiscal and other resources away from other potential areas of law enforcement and public expenditure.¹²⁵⁸ This is a particularly significant consideration when set against the reality that comparatively few drug offences are serious enough to result in prison sentences, and that many charges bought by police in relation to drug offences are, in fact, ultimately withdrawn. One view might be that already limited resources are better applied to large-scale traffickers and dealers rather than 'small time addicts and users'.¹²⁵⁹ In 2003, the federal Parliamentary Standing Committee on Family and Community Services acknowledged the considerable costs associated with the criminal processing of drug users, conceding that '...it clearly makes financial sense to divert [them] away from the criminal justice system'.¹²⁶⁰

15.5.4.7. Concluding remarks

The consideration of any extension of drug diversion or cautioning is ultimately one for the Government to determine. We do not suggest that the material in this report is sufficient to finally determine whether or not to again trial a diversion program for those found in possession of small amounts of drugs other than cannabis.

However, it does appear that police using drug detection dogs are criminally processing people found in possession of small quantities of drugs for personal use with no concurrent offences and often no criminal history of note. We have also seen that these offenders are often young and that the courts are dealing with them by way of fine or the recording of no conviction. Saliently, little in the way of drug assessment, treatment or education is offered to these predominantly young drug users.

We noted above (at paragraph 15.5.4.6) the potential impact of criminal processing on first-time offenders. Another important consideration is the economic cost to the community in terms of prosecuting offenders found with small quantities of drugs for personal use. For example, the time and cost to police and the prosecution in preparing a case for court, analysis of drugs, legal aid and court processing costs.

This report has noted significant criticisms from a range of sources that the drug detection dog program targets drug users rather than suppliers. We have also found that the drug detection dogs do not detect people in possession of large amounts of drugs and lead to very few convictions for supply. Almost two-thirds (12 of 19) of the successful prosecutions for supply involved drug supply to friends or partners. These criticisms would seem to compound when it is additionally noted that the vast majority of those detected possessing drugs other than cannabis are not part of any harm minimisation program and are not offered any drug assessment, treatment or information.

It may be that the use of drug detection dogs has created an opportunity for NSW Police to further their role in harm minimisation for drug users through early assessment and appropriate referral to treatment and/or provision of information. The time may now be right to more effectively implement the recommendations of the *1999 NSW Drug Summit* in this regard.

Recommendation

48. The Attorney General's Department consult with NSW Police and NSW Health to consider the formation of a steering committee to formulate a trial of a pre-court diversion program for persons found in possession of small amounts of drugs other than cannabis with an emphasis on drug assessment, treatment and education.

NSW Police supports this recommendation.¹²⁶¹

NSW Health was also supportive of the recommendation and noted the need for existing drug diversion programs to be considered in the development of any trial.¹²⁶²

The Attorney General advised that he supported this recommendation in relation to his:

*Department's possible input and/or involvement in the formulation of a pre-court diversion scheme for persons found in possession of small amounts of drugs other than cannabis. I acknowledge the changed context in which a diversion scheme similar to the Drug Offenders Compulsory Treatment Pilot could now operate in light of [this] report's findings, and I am amenable to pursuing consultation with NSW Police and NSW Health in furtherance of this recommendation.*¹²⁶³

The Attorney General also indicated his support for:

*each of the recommendations [49-53 below] ... regarding ways in which NSW Police may better reduce the harms associated with drug use, especially where access to health services are concerned.*¹²⁶⁴

15.6. Impact of drug detection dogs on health services for drug users

This section examines the impact of drug detection dog operations on the Medically Supervised Injecting Centre, needle and syringe exchange programs, methadone clinics and other harm reduction initiatives. It reflects the inherent tension between drug law enforcement on the one hand, and minimising the harm caused by drug use on the other hand.

15.6.1. Medically Supervised Injecting Centre

15.6.1.1. Background

The Medically Supervised Injecting Centre ('MSIC') is a NSW Government initiative arising out of recommendations of the *1999 NSW Drug Summit*. The MSIC is a harm reduction facility that has been operating in a central location in Kings Cross since 6 May 2001. 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 disorder issues arising from unsupervised and public injecting at a local community level.'¹²⁶⁵ When approving the trial of the MSIC it was the NSW Government's expectation that the facility would:

- decrease overdose deaths
- provide a gateway to treatment, and
- reduce the problem of discarded needles and users injecting in public places.¹²⁶⁶

During the first two years of operation 4,719 registered intravenous drug users made 88,324 visits to the MSIC. There were 553 drug overdoses, which were managed by health professionals on site. 81% of overdoses involved heroin and no fatalities were recorded. 1,852 clients were referred to other services and 44% of referrals were for treatment of drug dependence.¹²⁶⁷

An evaluation funded by the NSW Department of Health found:

- the operation of the MSIC in the Kings Cross area is feasible
- the MSIC made service contact with its target population, including many who had no prior treatment for drug dependence
- there was no detectable change in heroin overdoses at the community level
- the MSIC made referrals for drug treatment, especially among frequent attendees
- there was no risk of blood borne virus transmission
- there was no overall loss of public amenity
- there was no increase in crime
- the majority of the community accepted the MSIC initiative, and
- the MSIC has afforded an opportunity to improve knowledge that can guide public health responses to drug injecting and its harms.¹²⁶⁸

15.6.1.2. Drug detection dog operations and the MSIC

Drug detection dog operations in Kings Cross may deter people from using the MSIC. This potentially adverse consequence was raised during parliamentary debate on the Police Powers (Drug Detection Dogs) Bill 2001. Ms Clover Moore MP, (whose electorate of Bligh covers Kings Cross where the MSIC is situated) referred to a drug detection dog operation where police officers conducted activities directly adjacent to the MSIC, which resulted in users being driven away from the facility.¹²⁶⁹ According to Ms Moore:

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.*¹²⁷⁰

Dr van Beek commented that the impact of drug detection dog operations on MSIC was greatest when police first began to use dogs in patrols on 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 two or three hours so the MSIC would go from seeing about 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 into the back streets.*¹²⁷¹

According to Dr van Beek, clients have discovered methods of avoiding detection by the drug detection dogs and thus were no longer significantly deterred from utilising the MSIC during drug detection dog operations. Disturbingly, Dr van Beek commented that drug detection dog operations impacted on clients of the MSIC in other ways:

*one thing that's made a difference – we've had quite a few reports of – is that prior to the drug dogs up here, a lot of users ... would fund their drug use by selling small quantities of cannabis. ... and once the dogs turned up, because the dogs are particularly good at detecting cannabis, ... that was a problem for them, obviously. 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.*¹²⁷²

NSW Police refuted the suggestion by Dr van Beek that some clients of the MSIC had shifted to 'acquisitive crime' to fund their drug habits. According to NSW Police acquisitive crime in Kings Cross had fallen to 'record low levels'.¹²⁷³ In their submission NSW Police stated that:

*Police use of drug detection dogs has not had any significant impact upon use of the MSIC, and thus, operations involving drug detection dogs cannot be said to have caused any adverse impact on the health and welfare of drug users, by either turning users away from MSIC, or encouraging them into 'acquisitive crime' to fund their drug habits.*¹²⁷⁴

Dr van Beek also commented on the constructive working relationship that the MSIC enjoyed with local police. According to Dr van Beek police were exercising appropriate discretion in relation to clients of the MSIC 'with only very occasional exceptions'. Dr van Beek noted that:

*[the MSIC] has not had substantial complaints from clients as far as policing around the injecting centre goes – it hasn't been used as a mousetrap. People also haven't been bailed up when they've left the place – on account of drug use anyway.*¹²⁷⁵

Dr van Beek acknowledged the nature of the drug supply market in Kings Cross meant that police activity in the vicinity of the MSIC was inevitable:

*of course we see a large number of people [at the MSIC] and a proportion of those are people of interest to police. We chose to locate the [MSIC] in the centre of Kings Cross specifically because that was the area where there was the highest concentration of drug supply for many years. ... it makes sense for us to locate our facility right in the heart of where drug supply was the highest – because this is also where drug overdoses were the highest ... Having done that, it would have been unreasonable for us to then turn around and say – well we now would like the police to modify the way that they police drug supply in the area.*¹²⁷⁶

Kings Cross LAC has developed a policing policy in relation to the MSIC. The stated objectives are:

- to reduce crime
- to discourage drug dealing and the presence of drug dealers around the MSIC, and
- to comply with national harm minimisation procedures such as those already practised by police in the Kings Cross LAC in the policing of needle exchange and methadone clinics.¹²⁷⁷

The policy guidelines state that:

- policing will be implemented within the spirit and intent of the Government Initiative concerning the MSIC
- policing will not be restricted in the immediate area of the MSIC
- there will not be any 'no go' area outside the MSIC, and police will provide an ethical and cost effective law enforcement service to the community using all available legislation
- police will not carry out unnecessary patrols in the vicinity of the MSIC
- police will not seek to routinely enter the MSIC. However, police will enter in appropriate circumstances which includes an invitation from MSIC staff, and
- police will use their discretion in association with the guidelines in relation to the policing of the MSIC.¹²⁷⁸

The Police Association of NSW submission highlights the inherent tension between law enforcement objectives on the one hand, and harm minimisation principles on the other:

*Drug dog operations are conducted in the near vicinity of the MSIC as drugs are illegal in this state and police are duty bound to enforce the laws. However, recognition is given to the need for discretion near this facility so operations are not generally conducted at the front door. Similar discretion is utilised during operations near methadone clinics.*¹²⁷⁹

A drug educator we interviewed was of the view that drug detection dog operations should not take place anywhere near the MSIC:

*It sends completely the wrong message to drug users. ... [MSIC] is about getting them into treatment, getting them to think about their drug use, do all that sort of stuff, but they've got to go past a drug dog first.*¹²⁸⁰

Tony Trimmingham of Family Drug Support noted that:

*The principle of safety for users of the MSIC was to override any minor crime consideration is obviously damaged by the use of drug detection dogs in its vicinity. If any person is deterred from using the MSIC through fear of prosecution then this has major negative implications for the individual and broader public health.*¹²⁸¹

The Shopfront Youth Legal Centre also noted the possible deterrent effect of drug detection dog operations:

*The use of sniffer dogs in Kings Cross, in the vicinity of the Medically Supervised Injecting Centre, is potentially problematic. It is important for injecting drug users to feel confident that they can go to the Centre without being stopped, searched and prosecuted on their way there. The use of the dogs near the Centre increases the likelihood that users of the Centre will be searched, and that people will be deterred from accessing the Centre. This of course increases the likelihood that people will inject drugs elsewhere in a manner that is unsafe to them and other members of the community.*¹²⁸²

Redfern Legal Centre pointed to the potential impact of drug detection dog operations on drug users who access various health services like MSIC:

Without doubt invasive policing strategies like drug detection dog operations, which primarily target small-quantity personal users, erode harm minimisation strategies like the MSIC. The inappropriate use of drug

*detection dogs could be a backward step in this effective process. In particular, if police intend to conduct operations in or even in the vicinity of such injecting safe-havens, this will substantially undermine their purpose.*¹²⁸³

Redfern Legal Centre also advocated for a greater use of police discretion in the vicinity of the MSIC:

*We submit that there should be a ban on searching persons entering, leaving or within the MSIC. Moreover, guidelines should provide that where a person is detected within the vicinity of the MSIC (say, 500 metres) in possession of a prohibited substance which is intended for personal use at the MSIC by that person, then the police should exercise their discretion and escort that person to the MSIC and not record a charge or confiscate the substance or give any official caution. Harm minimisation strategies, such as safe-injecting facilities, must be promoted so that lives of dependent users can be protected.*¹²⁸⁴

We convened a focus group of injecting drug users who reported that they were less likely to use the MSIC as a result of drug detection dog operations.¹²⁸⁵ The users reported that they now 'scored' (obtained their drugs – mostly heroin) away from Kings Cross, which meant that they were less likely to attend the MSIC 'just in case the sniffer dogs are there'. The users said that they still had the same dealer and the only thing that changed was the location of the 'deal' (drug transaction), which was generally organised by mobile phone.

The users identified two potential hazards with their changed use. First, they would generally inject their drugs in a public location soon after purchasing them, which meant that no help would be available if they overdosed. Secondly, they acknowledged that they would usually dump used syringes after injecting, although one user stated that he broke the tip off the syringe before dumping it.

Some police contact with clients of MSIC is probably inevitable because police often carry out patrols of the Kings Cross Railway Station and surrounds which are in the vicinity of the MSIC. Seeking a balance between effective policing of drug-related crime and minimising any adverse impact on clients of 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 involving many competing objectives within the harm minimisation rubric.

15.6.2. Needle and syringe exchange programs

Needle and syringe exchange programs ('NSPs') are a vital component of Australia's harm minimisation approach to drug use. Encouraging users to use clean needles and syringes eliminates the risk of blood borne viruses such as HIV and Hepatitis C. NSPs also encourage drug users to dispose of used needles and syringes in a hygienic and safe manner which enhances public amenity. Furthermore, some NSPs provide health promotion information to drugs users.

15.6.2.1. Drug detection dog operations and NSPs

A number of submissions we received referred to the possibility of drug detection dog operations deterring drug users from accessing NSPs. The AIDS Council of NSW noted that:

Many support services for people who inject drugs are located in areas where the use of drug detection dogs is prevalent. Clients of our Needle Syringe Program (NSP) have raised concerns about being sniffed by dogs when they are in possession of used syringes on their way to the NSP in order to return them. This presents a disincentive to return used equipment to the NSP and an increased likelihood that injecting equipment may end up being disposed of in public areas.

Some clients of the NSP have said that concern over contact with drug detector dogs has meant that they visit the NSP less frequently and access larger amounts of equipment, however, people who have no permanent address don't have homes where they can stock larger amounts of sterile injecting equipment.

*Concern over contact with detector dogs also results in reduced interaction with NSPs, which has a negative effect on relationship building, provision of information, referrals and advice about drug treatment programs.*¹²⁸⁶

The UTS Community Law Centre noted that deterring drug users from NSPs has:

*a considerable impact on the health and welfare of the community, as users are more likely to dispose of injecting equipment at the point of use, rather than returning it to a needle exchange for safe disposal.*¹²⁸⁷

Similarly, the Hepatitis C Council of NSW were of the view:

*The [Drug Dogs Act] might actively deter people who inject drugs from returning used injecting equipment to needle and syringe programs (NSP) and other disposal facilities as they may be hesitant in carrying used equipment in areas that may be targeted by sniffer dog handlers. This could easily result in the unsafe disposal of injecting equipment either in household garbage or within public areas, with a commensurately higher level of personal and community risk resulting.*¹²⁸⁸

The NSW Users and AIDS Association approached the issue from a broader perspective:

*Peer-based education is a major component of NUAA's ongoing work and the Association is alarmed drug dog operations are deterring illicit drug users from getting together to access frontline health services including methadone clinics and Needle & Syringe Programs. We subsequently condemn the practice of using drug dog patrols in the vicinity of methadone clinics and Needle & Syringe Programs.*¹²⁸⁹

The Shopfront Youth Legal Centre was concerned that the use of drug detection dogs may discourage users from disposing of used needles appropriately because of the dogs' capacity to detect the residual scent of a drug in a used syringe:

*Although it is not an offence to possess a syringe, many users may quite justifiably wish to avoid the inconvenience and indignity of being stopped and searched. There may also be other consequences for a person found in possession of a used syringe in certain areas. For example, in Cabramatta, it has been the practice of police to confiscate syringes and to use them as grounds to issue a move on direction which effectively excludes the person from Cabramatta for a defined period of time.*¹²⁹⁰

During our observational research we noted that police occasionally located needles and syringes as a result of searches carried out on persons indicated by a drug detection dog. We did not observe any confiscation or destruction of needles by police in situations where no offence was detected.

15.6.2.2. Possession of syringe charges

Section 11(1) of the *Drug Misuse and Trafficking Act 1985* provides:

A person who has in his or her possession any item of equipment for use in the administration of a prohibited drug is guilty of an offence.

However, there is an exception in relation to needles and syringes in section 11(1A):

Subsection (1) does not apply to or in respect of a hypodermic syringe or a hypodermic needle.

During our review we noted that an accused was charged and convicted (ex parte) of possession of equipment for administering a prohibited drug.¹²⁹¹ The COPS event narrative states that a 'capped syringe' was located in the accused's handbag.¹²⁹² However, whilst possession of equipment for administering a prohibited drug is an offence, the exception in relation to syringes has existed since 1987. Thus it appears that the person in this case may have been incorrectly charged and convicted of the offence.

We also came across another occasion where a person was charged and convicted of possession of equipment for administering a prohibited drug that involved a syringe.¹²⁹³ On this occasion the COPS event narrative states that the accused co-operated with police and voluntarily produced a syringe from his jacket that contained traces of blood.¹²⁹⁴ Arguably it was in the searching police officer's best interests that the accused produced the syringe to avoid any possible hazard or injury to the officer. Nevertheless, it appears that police may have incorrectly charged this person for the possession of a syringe notwithstanding the fact that this is not an offence.

15.6.3. Methadone clinics

Methadone clinics play an important role in demand and harm reduction strategies aimed at drug users. The provision of methadone in a controlled and medically supervised manner ensures that drug users reduce or eliminate harmful drug taking practices. Not only does this result in positive health outcomes for the individual, but also benefits the community in many ways. For example, drug users on a methadone program no longer have to fund expensive drug habits by committing crime.

15.6.3.1. Drug detection dog operations and methadone clinics

Dr Alex Wodak noted that policing activity in the vicinity of methadone clinics, such as drug detection dog operations, may be counterproductive insofar as:

*we know that for every hundred people on methadone for a year there are 12 fewer robberies, 57 fewer break and enters and 56 fewer motor vehicle thefts,¹²⁹⁵ ... so even just for crime alone, we shouldn't be allowing police operations, unless they are absolutely essential, to interfere with methadone programs.*¹²⁹⁶

Dr Wodak acknowledged that most police understood the net benefit of methadone programs and provided the following sobering comments in relation to possible detrimental effects of over policing clients of methadone clinics:

*So if we want to have an HIV epidemic, starting off in drug users and spreading out into the general community, if we want to have more crime, if we want to – don't mind a few more drug overdose deaths in young people, then by all means let the police interfere with methadone units, but if the aim is to reduce death, disease, crime and corruption, methadone units should be – we should be making it as easy as possible for methadone units to do as good a job as they can – difficult work. We shouldn't be making it more difficult for methadone units to do the hard job that they have to do.*¹²⁹⁷

A senior police officer we interviewed was supportive of methadone clinics insofar as clients of the clinics:

*don't have to commit as many crimes to fulfil their habit as they would of if they were on heroin. So, it's in our interest that the methadone clinics operate efficiently and effectively, that the people get their [metha]done, they're not terrorised or picked on specifically and we allow the free flow of them to pick up their methadone and get out of the place afterwards.*¹²⁹⁸

Many of the submissions we received expressed some concern about the potential adverse impact of conducting drug detection dog operations in the vicinity of methadone clinics. For example, the Youth Justice Coalition stated:

*We are seriously concerned at the very likely impact that this will have on the willingness of people to use such clinics, ... which are an important part of the government's harm minimisation strategy.*¹²⁹⁹

The NSW Council for Civil Liberties was also concerned about police activity in the vicinity of methadone clinics:

*because methadone clinics are an important part of the government's drug harm minimisation strategy, which was adopted after the 1999 Drug Summit.*¹³⁰⁰

The Council also argued that the practice might scare clients away from methadone clinics with the potential for clients to return to illicit drug using behaviours.

The views of the Council were echoed by the UTS Community Law Centre who suggested that the practice of targeting clients of methadone clinics:

*raises serious public health concerns and jeopardizes a fundamental component of the government's drug harm minimisation strategy. These clinics are intended to improve the health and safety of drug users, and hard line policing such as this will deter people from accessing the clinic and, in all probability, compel them to resort to harmful alternatives.*¹³⁰¹

A drug treatment doctor made the following observations:

*I have observed some disadvantages to the use of sniffer dogs at Redfern Railway Station this year. Patients of mine have been intercepted, searched and inconvenienced on their way to obtain treatment for their drug addiction. Two problems have arisen, one due to delays over police action delaying their arrival at the clinic until after closing time, thus preventing them from accessing their medication. Secondly, people have been reluctant to use the train at all, staying home for deliveries of heroin which are now easier to obtain than pizza, in spite of the enormous potential penalties.*¹³⁰²

According to the same doctor, similar problems occur at Kings Cross Railway Station, which like Redfern, is a station utilised by many patients of nearby treatment clinics and the MSIC. The doctor opined that:

*it just puts another impediment in the way of people getting appropriate treatment.*¹³⁰³

15.6.3.2. Targeting of methadone clinics

The targeting of clients of methadone clinics was raised in a submission that we received. The NSW Council for Civil Liberties was of the view that targeting methadone clinics:

*is contrary to the spirit of the government's drug harm-minimisation policies and could discourage people from their methadone treatment.*¹³⁰⁴

In their submission the Council detailed the contents of a number of drug detection warrant applications that they had inspected.¹³⁰⁵ The Council noted the practice whereby police would include the following (or similar) statement to support the warrant application:

*The proximity of the methadone clinic attracts distributors of prohibited drugs who know that there is a ready source of customers to be found in the local vicinity.*¹³⁰⁶

We noted similar statements during our audit of intelligence information provided in requests to the Dog Unit for the deployment of a drug detection dog.¹³⁰⁷ For example, Operational Orders attached to one request contained the following statement:

*Intelligence suggests that clients of the methadone clinic at [name of suburb] are in most cases High Risk Offenders from other Local Area Commands. The drug detection dog has indicated that these persons may be in possession of a prohibited substance and in some cases this has proven correct.*¹³⁰⁸

As part of our audit of intelligence information we came across a successful request to conduct a drug detection dog operation at a railway station and surrounding CBD (Central Business District), which were in the vicinity of a methadone clinic.¹³⁰⁹ Some of the intelligence information was based on an operation (without a drug detection dog) where police stopped and talked to persons seen leaving the methadone clinic. Generally police just talked to clients and in some instances did radio checks. The following information report is indicative of the type of information gathered by police during this operation:

*[Date, location, name, address, DOB] Priors: street offences, assault. Intel: Drugs Other, Drugs Heroin, Public Order, Self confessed drug user. Police was at the above location and stopped to speak to the P.O.I. The P.O.I stated that he had just come out of the methadone clinic where he is registered on the program. The P.O.I stated that he attends the [name of clinic] Monday, Tuesdays and Friday and then receives takeaways for the rest of the week. The P.O.I showed police his methadone bottle which showed a dose of 80ml daily. Police conducted checks with nil outstanding. The P.O.I then left.*¹³¹⁰

During the same operation police also stopped vehicles driven by persons who had attended the clinic. For example, one information report contained the following:

*[Date, 11.05am, location:(near methadone clinic)]. POI 1: [name, DOB] Priors: Drug Detection, Stealing. POI 2: [name, DOB] Priors: Nil. VOI [Vehicle Of Interest] [registration] Blue Mitsubishi Lancer. On the above date and time police stopped the VOI. The vehicle at the time was carrying POI 1 & POI 2. The VOI had been seen to be driven by POI 2 after attending [name of methadone clinic]. POI 1 attends everyday and receives 50 mls of methadone every Monday, Wednesday and Friday and he receives two takeaways. POI 2 receives 50 mls daily which she consumes at the premises of the [name of methadone clinic]. There was nil outstanding on both POI's after a check via Police radio, and the POIs continued on their way.*¹³¹¹

A client stopped by police during this operation appeared to be affronted by the police questioning:

*Time and Date: 1036hrs [date] Location: [close proximity to methadone clinic]. POI [name, DOB, address]. At the above time and location the POI was seen to come out of the [name of methadone clinic]. The POI has denied being on the Methadone program and has become very defensive and abusive towards police. A CNI [Central Names Index] check on the name supplied by the POI showed he was not adversely known to police. However he later stated he had had 'unpleasant dealings with police'. Police believe that the name given maybe an alias and for police in future to verify with multiple Ids.*¹³¹²

NUAA were critical of the police practice of approaching persons on the basis they have accessed a health service:

Our research among health service users found that drug dog operations are targeting people in the close vicinity of methadone clinics and Needle & Syringe Program services.

*We particularly condemn the reported police practice of artificially applying the notion of 'consorting' to people accessing Needle & Syringe Programs, methadone clinics and other health services.*¹³¹³

However, as one senior officer we interviewed pointed out, the issue of allowing persons to freely access methadone clinics is sometimes complicated when local businesses and residents complain that clients of the clinic congregate in front of their shops and residences.¹³¹⁴ In these circumstances, uniformed police may choose to patrol the area in the vicinity of the methadone clinic to dissuade clients from staying in the local area after receiving their medication. Hence, there may be occasions where uniformed police are in the vicinity of a methadone clinic because local businesses or residents have complained about the presence of the clients. In these circumstances police are usually endeavouring to strike a balance between ensuring that clients are able to access clinics on the one hand, and maintaining local amenity on the other.

We attempted to contact managers from various methadone clinics to ascertain their views on policing activity with drug detection dogs in the vicinity of clinics. We were only successful in securing one interview with the manager of an inner-city methadone clinic. The manager of this clinic stated that the clinic had an 'excellent' relationship with local police and that there were no reports from clients of problems with police or drug detection dogs in the vicinity of the clinic.¹³¹⁵

15.6.4. Health promotion events

One submission we received referred to the potential damage that may be caused by carrying out drug detection dog operations during health promotion events. The following illustrates the concern of health workers who were participating in health promotion activities when drug detection dogs arrived:

We were having a good day at our Drug Action Week stall in June [2004] in Liverpool Mall. We had done several referrals to AOD [Alcohol and Other Drugs] treatment and hepatitis C services, spoken with a number of people about AOD-related issues and run some health promotion activities. There were a number of stalls in the mall staffed by community, health and welfare workers. There was also a Police Service stall there.

We were using the opportunity to do some health promotion about preventing blood borne viruses and providing information and referrals to AOD and welfare services. It's often easier to do this at a community event rather than expecting people to front up to a potentially intimidating health service.

There was a lot of interest in our stall. At times quite a crowd gathered to collect information and chat about various drug-related health issues. ... and then the police came right through the middle of the displays with sniffer dogs! They grabbed someone right outside a drug health service stall. The crowd evaporated and the workers were left stunned.

Most of us could hardly believe that at a national AOD health promotion event, an action that undermined its whole intent could be carried out, apparently without a second thought ... or indeed, even a first one. We heard that no arrests were made and the organiser of the event (who protested strongly at the police station) was told that this would not happen again. Several hours later, it did. If police had wanted to sabotage the event they couldn't have done a better job. Even the police on their service stall looked a bit taken aback.¹³¹⁶

15.6.5. Discussion

The foregoing discussion of the impact of drug detection dog operations on health services demonstrates that there is clearly no easy reconciliation of the inherent tension between the objectives of drug law enforcement on the one hand and harm reduction on the other.

We have noted above (at paragraphs 15.6.1.2 and 15.6.3.2) that some contact between police conducting drug detection dog operations and drug users is inevitable given that some drug health services are located in or around areas where drug supply occurs.

It makes little sense to specifically target drug users accessing health services whose objective is reducing the harms of drug use. However, any drug dealing activity that occurs in and around health services is a legitimate target of policing activity. The challenge for police is striking a balance between reducing drug supply on the one hand, and ensuring that drug users are not hindered or dissuaded from accessing harm reduction services on the other hand.

One way to ensure police officers appreciate the importance of harm reduction services is to provide education and training on the role and value of these services. Such training would hopefully lead to recognition that police and health services have complementary roles in achieving harm minimisation objectives. This in turn may lead to the building of effective partnerships and may also encourage police officers to exercise their discretion in appropriate circumstances.

In our view the incorporation of harm minimisation principles into police guidelines for conducting drug detection dog operations would alert police officers to the need to consider broader harm minimisation principles when carrying out their duties. This may lessen any adverse impact that operations have on drug users who are not the primary targets of the Drug Dogs Act.

Recommendations

49. When conducting drug detection dog operations in the vicinity of drug health services, police should specifically consider and outline harm minimisation issues in operational orders.
50. NSW Police continually assess the impact of drug law enforcement strategies (including drug detection dog operations) on access to drug health services, including regular consultation and liaison with health service providers.

NSW Police supports recommendation 49 and noted that they:

have guidelines to assist police working in the vicinity of drug health services, including the Needle and Syringe Guidelines, the Methadone and Other Pharmacotherapy Guidelines, and guidelines in relation to the Medically Supervised Injecting Centre (MSIC).

While it is evident that drug dog operations took place in the vicinity of methadone clinics for example, based on the information in the report about these operations, police responded in accordance with the NSW Police methadone guidelines, which stipulate that police are required to respond in line with normal expectations if criminal activity is occurring in the vicinity of a methadone clinic.

In relation to the incident involving a drug dog operation at the 'Drug Action Week' event, NSW Police Drug and Alcohol Coordination (DAC) will now advise Local Area Commands in advance of Drug Action Week to ensure that they are aware of this event. DAC will also contact NSW Health Drug and Alcohol Coordinators and suggest that they may wish to make contact with local police leading up to Drug Action Week.¹³¹⁷

NSW Police supports recommendation 50 and advised that:

There are already several forums in which NSW Police liaises with health service providers, for example Local Area Commands liaise directly with local health services such as Needle and Syringe Programs and Methadone clinics.

NSW Police policies, such as the Needle and Syringe Programs Guidelines, advise that, where there is no operational conflict, police should liaise with local health agencies.

Police also consult with NSW Health agencies through other forums, such as Community Drug Action Teams (CDATS) and PACT (Police and Community Team) meetings.

NSW Police also liaise with health agencies at a regional and executive level, in forums such as the RCMG (Regional Coordination Management Group) and the Intergovernmental Committee on Drugs (IGCD).¹³¹⁸

15.7. Harm minimisation education and training for police officers

Many of the police officers who participated in focus groups and interviews reported that they had received little or no education or training in relation to broad harm minimisation objectives.

One senior officer we interviewed suggested that police officers in areas where there are NSPs, methadone clinics or the MSIC might have some basic knowledge of harm minimisation principles. However, the officer believed that most police would only have limited knowledge and many would have difficulty putting it into practice given the lack of any formal training.¹³¹⁹

One drug educator we interviewed commented that NSW Police received very little formal drug education at the police academy nowadays. However, he noted that officers might receive some locally based training from time to time.¹³²⁰

It appears that police officers would benefit from education and training that explores the broader objectives of harm minimisation. In particular, we are of the view that a better understanding of harm reduction initiatives would result in police officers being better equipped to use their discretion in a manner consistent with harm minimisation objectives. We agree with the advice of Dr Alex Wodak who advocates peer-based training:

My advice would be, based on my AIDS experience, that if you want to influence police they should be trained by other police. Having health people train police properly gets their backs up, I think that people working in the [drug treatment] area should train the trainers, but I think the trainers should be police ... peers influence peers ...¹³²¹

Recommendations

51. NSW Police implement a harm minimisation education and training program for all police officers.
52. NSW Police provide specific harm minimisation education and training for police officers in areas where drug health services operate.

NSW Police indicated in principle support for recommendation 51 and noted that police recruits currently receive some training in harm minimisation. NSW Police also noted that:

*DAC has recently developed a new 'Drug Diversion Training Package' as part of the Illicit Drug Diversion Initiative (IDDI). Half of this training package is dedicated to harm minimization. This package has been approved as part of the Mandatory Continuing Police Education Scheme (MCPES), and DAC is seeking to have this package made mandatory.*¹³²²

NSW Police supports recommendation 52 and noted that DAC is currently developing the 'Drug Diversion Training Package' which encompasses harm minimisation.¹³²³

15.8. Prescription drugs

In Chapter 8 'Accuracy of drug detection dogs' we noted that police located prescription drugs on 18 occasions as a result of drug detection dog operations. According to NSW Police, drug detection dogs are not specifically trained to detect prescription drugs and thus it is not clear why these people were indicated. On some occasions admissions of recent drug contact were made, which may explain the reason for the drug detection dog indication. However, on other occasions it was not clear why the person had been indicated.

During our review we noted that police responded in various ways to the location of prescription drugs during the search following a drug detection dog indication. On some occasions police accepted the explanations offered by persons in possession of prescription drugs and took no further action. However, we also came across occasions where police confiscated prescription drugs in circumstances where it appears that the person was lawfully entitled to be in possession of the drugs.

The NSW Council for Civil Liberties submission reported the following incident which had been notified to the organisation:

Case study

Stomach infection medication confiscated

As the police with dogs exited the club the dog ran straight towards me and jumped up clawing at the top of my jeans. At this point a very rude blonde female police sergeant told me that I was basically under arrest and anything I said or did could be used against me. The sergeant assumed I was drunk or under the influence of drugs, when in fact I had not had a drink all night. She was rude, unhelpful and very sarcastic to me when she asked to spell my name. I did so and she muttered under her breath "That's what I said" as she shook her head ...

I stayed very calm and assisted the police in every way possible. I had to lift my shirt above my head whilst a male officer stuck his leather not latex gloves down the top of my pants in front of my friends, boss, work colleagues and clients, this is not only unhygienic but has had a massive impact on my credibility within this group of people.

They found two items of interest in my bag:

Wine Knife: A standard barman tool for opening bottles of wine. [The man being searched worked as a barman.] The police did not confiscate it because they said "You seem like a nice guy" and they did not think I would use it as a weapon.

Metrogyl: This is a prescription medicine that I was taking to stop a stomach infection that I had. It had my name on it and all the tablets were marked the same way on both sides.

Immediately on discovering this, they removed the bottle from view to perform "independent tests" on it with the dog. Five minutes later or so they came back and said that this was what had set the dogs off and I didn't see the tablets again til I was asked to verify the total weight of the tablets. The female sergeant told me that the prescription medication would be confiscated and I would get it back in 6 to 8 weeks or I would "Receive a knock on the door before that." I asked the female blonde sergeant what would happen if there was nothing wrong with the tablets she aggressively told me not to ask her. I tried to explain to her that I needed to complete the prescription under doctors' orders, she looked at me and shook her head with a sarcastic smile, my comment was hardly acknowledged.

Even though I did permit a search to take place, I feel that the police conducted a very poor search. What would happen if the medication was vital for my health eg a heart condition? I do not think these police would have cared they were just hell bent on busting me for something.¹³²⁴

The following COPS event narrative details another occasion where prescription drugs appear to have been confiscated by police:

Case study

HIV/AIDS medication confiscated

TIME: 10:25pm

DATE: 06/09/2002

LOCATION: Oxford Street, Darlinghurst

POI: [name, DOB, address, driver's licence number]

DRUG: 5 tablets, various brands and colours POI stated it was his HIV medication. Three appeared to be legitimate with manufactures ID numbers. Two appeared home made and rough.

... police were patrolling the location when the drug detection dog indicated to his handler the scent of a prohibited drug in the free air waves around the POI. The POI immediately became defensive, stating that he was HIV positive and the tablets he had with him were his HIV medication. Police explained to the POI that they wished to search him. He was asked to empty his pockets onto the step at the above location. The POI stated that he wouldn't put his medication on the ground. Police again told the POI to empty his pockets onto the step. The POI produced from his front right jeans pocket the above drugs. Police asked the POI why they were not in the appropriate packaging. The POI was defensive stating that he was on his way out with his medication.

The POI was searched. Nothing further of interest was located on the POI.

Police consulted with the duty officer [senior officer in charge] present at the scene. The POI repeatedly stated, "You're going to charge me for having a dog sniff at my balls. I haven't done anything wrong. You found nothing. Are you going to arrest me or let me go."

Police informed the POI that his medication was suspected to contain prohibited substances and that it was being confiscated for analysis. The POI demanded that police drive him home so he could take his medication. He was informed that police did not have the resources to do that, but he was free to catch a taxi or bus home if he wished to.

The POI's details have been recorded. He was allowed to leave. Drugs to be analysed.

On Saturday the 23/11/2002, police received an analyst certificate for the above drugs. The certificate indicated that NONE of the tablets found in the POI's possession contained a prohibited drug.

No further action to be taken.¹³²⁵

It appears that police informed the person involved in the above incident of the outcome of the analysis.

On another occasion police confiscated two white tablets from a man who stated that he needed the medication for a behavioural condition unknown to investigating police. The police record of this event noted that the man, 'appeared to present a genuine reason for substance possession and was subsequently released from police custody at the scene.' The tablets were analysed and found to contain no prohibited substances.¹³²⁶

We are concerned that the police practice of confiscating prescription drugs during drug detection dog operations may result in negative consequences for persons whose medication is necessary to maintain their health or remedy a condition. The practice has the potential to cause the person:

- inconvenience (where the person has to return home to obtain a replacement dose)
- expense (where the person has to return to a doctor to obtain a new prescription), and/or
- detriment to health (there may only be some minor detriment when a single dose is confiscated, but this may have a critical impact where the medication is used to control certain conditions such as diabetes, angina, or epilepsy. Further, a greater detriment may result when police choose to seize all drugs and the person is left without any medication.)

During a focus group with police officers it was suggested that persons carrying prescription drugs should carry a copy of the prescription or the repeats.¹³²⁷ Whilst this suggestion may assist police to eliminate doubt in some situations, we note that the suggestion may not be feasible in all circumstances. For example, where a person obtains a prescription from a doctor and the prescription is retained by the pharmacy after the medication is

dispensed, or in circumstances where the person received the medication directly from a doctor or hospital. Furthermore, we have not been able to identify any law requiring a person in possession of a drug that has been lawfully prescribed or supplied to carry evidence of the fact that it was lawfully prescribed or supplied.

It is worth noting that there may be a number of reasons why a person might not be carrying prescription medication in its original packaging. For example, if a particular medication is packaged in a bottle containing 100 tablets and the person is only required to take one tablet during or after a meal, then as a matter of convenience, and perhaps to maintain the integrity of the remaining medication, it would appear sensible for the person to carry a single tablet rather than the whole bottle. Further, some people may be required to take a number of different medications with food and thus they may quite reasonably not want to carry a multitude of labelled bottles and packets whenever they decide to eat in public places.

Police may have a legitimate interest in persons carrying prescription drugs because it is an offence to possess or supply prescription drugs that were not lawfully prescribed or supplied.¹³²⁸ We note that police are sometimes placed in a difficult situation when attempting to discern whether drugs in a person's possession were lawfully prescribed or supplied. In our view police should exercise care, judgement and common sense before deciding to confiscate medications that a person appears to be taking for legitimate health reasons. The overriding consideration should be the health and well being of person being searched.

Recommendation

53. NSW Police develop guidelines in relation to the discovery of prescription drugs as a result of person searches. The guidelines should outline various considerations to be taken into account before a police officer decides to confiscate substances that may be prescription medication. In particular, the guidelines should acknowledge that there might be legitimate reasons for persons carrying prescription drugs out of its usual packaging and that there is no legal requirement for a person to carry evidence that prescription drugs in their possession were lawfully obtained or supplied.

NSW Police supports this recommendation.¹³²⁹

15.9. Medical use of cannabis

The medical use of cannabis has been discussed for a number of years in New South Wales. In 2000 a working party established by the NSW Government recognised that cannabis may have some value in the treatment of a limited range of medical conditions such as HIV-related wasting, nausea caused by chemotherapy for cancer, muscle spasm in some neurological disorders, and pain that is not effectively relieved by conventional analgesics.¹³³⁰ The working party recommended that patients who are certified as having a specified medical condition be granted an exemption from prosecution for possession and/or cultivation of personal use quantities of cannabis.¹³³¹

In May 2003 the (then) Premier of New South Wales, the Hon. Bob Carr, announced his support for the trial of a program allowing people suffering from serious illnesses to lawfully use cannabis. As recently as May 2004 the NSW Government affirmed its commitment to pursue the issue.¹³³² However, it seems that various legal issues have delayed progress and at the time of writing no further progress on the trial has been made.

We have been informed that a number of individuals suffering from certain medical conditions like cancer and HIV/AIDS are using cannabis for medical purposes notwithstanding that it remains illegal to do so in NSW. An HIV treatments policy officer we interviewed noted that:

*it's a recommendation actually amongst some HIV specialist physicians that cannabis is a useful adjunct to controlling nausea, enhancing appetite and pain control for people at late stage HIV disease.*¹³³³

It is a fact that some individuals are using cannabis for medical purposes and this may result in them being identified during drug detection dog operations. The AIDS Council of NSW confirmed this possibility in their submission:

*Use of drug detection dogs in areas with concentrations of GLBT [Gay Lesbian Bisexual Transgender] residents also has an impact on members of the community who may be using cannabis medicinally to ameliorate the effects of HIV disease. This is a particularly difficult issue as there is no legal alternative to illicit medicinal use, since the medicinal cannabis trial announced by the NSW government in 2003, has yet to commence.*¹³³⁴

In response to our discussion paper, a person living with HIV made the following submission relating to the medicinal use of cannabis:

*As an HIV-positive person who has dealt with the virus and serious prescription drug side effects for many years, I cannot tell you how useful cannabis can be for a variety of health reasons. If people were allowed to grow a few cannabis plants for personal use then we may put an end to the increase of indoor hydroponic cannabis that is far stronger and damaging to people.*¹³³⁵

It is worth noting that there appears to be wide spread community support for the medical use of cannabis. For example, 68.3% of persons living in NSW surveyed for the 2004 National Drug Strategy Household Survey supported a change in legislation permitting the use of cannabis for medical purposes. Furthermore, 74.2% of NSW respondents supported the idea of a clinical trial for people to use cannabis to treat medical conditions.¹³³⁶

15.10. Impact of drug detection dogs on the behaviour of drugs users

The use of drug detection dogs may result in drug users altering their drug use behaviour. On the one hand users may reduce or cease their drug consumption. On the other hand, users may engage in more risky and dangerous drug taking practices in order to avoid detection.

15.10.1. Reaction to drug detection dogs by drug users

Many submissions we received expressed concern about drug detection dog operations in environments where drugs were being consumed. The following quote sums up some of the concerns that were raised during a consultation with community and legal groups soon after the commencement of the Drug Dogs Act:

*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 or type of drug obtained. Such actions have been associated with police use of drug detection dogs in areas known for recreational drug use.*¹³³⁷

Similarly, a drug educator we interviewed noted that ecstasy and related drug users reported changes in drug use patterns in response to drug detection dog operations. These changes included:¹³³⁸

- taking larger amounts of drugs before leaving home rather than spacing out their drug use
- taking drugs at home and then driving to a dance venue
- going home (usually with a vehicle) to take more drugs, and
- taking other (usually more dangerous) drugs which ecstasy and related drug users believe the drug detection dogs cannot detect.

The same drug educator was of the view that drug detection dog operations at licensed premises and dance parties are inconsistent with harm reduction principles:

*I think it is an incredibly dangerous activity. ... it frightens people ... people take bigger risks. ... I've spoken to young people where the police have come in and literally gone into their pants and they've just swallowed everything they've got. I don't see any benefits whatsoever. I think it has destroyed relationships and I think that is very sad because there are many police who have worked extremely hard in certain local area commands to develop relationships and create better understanding between police and youth cultures.*¹³³⁹

NUAA conducted a series of focus groups with users of health services to gather information for their submission. During these focus groups users reported the practice of swallowing all of their drugs when learning of a nearby drug detection dog operation. Users also reported that they would have consumed the drugs over a predetermined timeframe if it were not for the drug detection dog operation. NUAA pointed out that the potentially harmful practice of hastily swallowing drugs increases the risk of overdose:

*Information obtained via NUAA's Information Support & Referral Service also provides anecdotal evidence to indicate an increasing trend among East Sydney partygoers to consume drugs in one go to avoid being found in possession of the drug if later detained by drug dog operations. ... NUAA notes the risk of overdose is more likely when combinations of drugs of unknown purity or potency are taken at once ...*¹³⁴⁰

The hazardous practice of consuming drugs in this manner was also referred to by Ms Clover Moore MP during parliamentary debates of the Police Powers (Drug Detection Dogs) Bill 2001:

*I [have been] informed by the director of the Kirketon Road clinic that when sniffer dogs appear heroin users swallow their drugs. That, of course, is a very dangerous practice.*¹³⁴¹

Those people we interviewed in our fear of crime survey were asked what they thought and/or felt when they saw police during a drug detection dog operation.¹³⁴² Below is a sample of responses:

*They are the boys in blue – I better pop my pill before they get me!*¹³⁴³

*Take me drugs real quick.*¹³⁴⁴

*Paranoia – because of the drugs that I was carrying – I ate the drugs. Took three pills at once but would've taken them all anyway. The dogs wouldn't be able to pick up the [ecstasy] anyway. I left the pot in the car because the police can pick it up.*¹³⁴⁵

A licensee of a hotel made the following comments in relation to drug detection dog operations in licensed premises:

*The ... point is that I think it is a public health nightmare. It's a dangerous strategy. I've been in bars where dogs have come in and I've seen people suddenly swallow drugs. I've been in other bars in Oxford Street where the dogs have come through and suddenly they panic. They're either thrown on the floor or they are scared to be seen throwing and they shove them down their throat. You've got kids swallowing three [or] four ecstasy in panic because the dogs are coming through or the lights are coming on. I think that's a public health risk that's a nightmare and I don't think it's acceptable. It's a dangerous police strategy ... it's going to blow right up.*¹³⁴⁶

The UTS Community Law Centre pointed to evidence suggesting that drug users:

*in the face of the threat of a dog search, will take all the drugs they have on their person to avoid detection, even where the quantity far exceeds what they would ordinarily consume. For example, evidence following Operation Guardian over the Big Day Out long weekend this year [January 2004] indicates that ticket-holders were taking all their drugs before arriving, in order to evade detection by the drug detection dogs. We submit that the use of drug detection dogs contravenes harm minimization policies and contributes to significant public health problems.*¹³⁴⁷

The Youth Justice Coalition expressed serious concern about the potentially dangerous consequences of using drug detection dogs on young people attending events such as the Big Day Out. The Youth Justice Coalition reported the first-hand experience of a young person:

*People all around me were panicking. I had one ecstasy tablet in my wallet and I was totally freaked about what I should do. My friend encouraged me to relax and walk on through, which I did. But there were others who took their drugs there on the spot – and I'm sure some people took whatever they had on them. It was very scary – wondering what would happen to me and worried about others who might seriously have gotten really sick ...*¹³⁴⁸

The Hepatitis C Council of NSW noted that drug detection dog operations could have a detrimental impact on the health of drug users and they offered the following example to illustrate their view:

*If people are carrying a small supply of drugs for their personal use to, say, a dance party, and they notice there is likely to be a search, they might decide to take all their drugs at once rather than be subject to the search and/or penalty arising through their carrying of these drugs. The potential for this to lead to overdose and other harm is high.*¹³⁴⁹

A number of other submissions noted that the potentially dangerous reaction of drug users who swallowed all of their drugs to avoid detection:

*recreational users, when approached by drug detection dogs, might resort to consuming larger doses of drugs which they have in their possession and which they intended to use over a staggered period of time or to share with friends in order to avoid detection. The risk of overdosing or suffering other extreme and serious bodily reactions from such practices is clear and alarming.*¹³⁵⁰

*The use of sniffer dogs presents further serious health issues for the community. People are swallowing all their drugs when they see the dogs approaching, or abandoning their drugs where children or others might find them.*¹³⁵¹

*We also share the concerns expressed by some groups that users of "recreational" drugs such as ecstasy and amphetamines may, when they become aware that sniffer dogs are approaching, consume all of their drugs in an attempt to avoid detection.*¹³⁵²

*I think that there's also another bad side to the sniffer dogs ... in the queue to [name of venue] in November last year [2003] as the dogs were approaching I saw all these kids swallowing their pills in the line. ... I mean there's no 'safe' way to take drugs ... but making people panic so they swallow everything in one go isn't exactly a good move!*¹³⁵³

Police are aware of the potential for drug detection dog operations to have some adverse effect on drug users. For example, a senior police officer acknowledged that police were concerned about the risk of persons swallowing all of their drugs at once to avoid detection during drug detection dog operations. The officer was reported as saying that swallowing drugs:

*could have fatal consequences ... People have to make the decision. Do they want to be arrested over a few little tablets or a gram, or do they want to risk killing themselves?*¹³⁵⁴

During a focus group one police officer commented that:

*We've actually had an ambulance on standby in the area in case there's an OD [overdose] which was caused by us going through [the venue].*¹³⁵⁵

However, the law enforcement role of police appears to take precedence when conducting operations in environments where illicit drug use occurs despite the potential for hazardous reactions by drug users. 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, there were people popping things in their mouths, but we as a Service can only tell you that it is dangerous and will seriously risk your health.*¹³⁵⁶

15.10.2. Changes in drug use patterns

The use of drug detection dogs may also result in users altering their regular drug use patterns. For example, users who fear being detected by drug detection dogs in public places may elect to take more drugs before leaving home rather than staggering their drug use out over a number of hours.

Ms Clover Moore MP expressed her concern:

about the health risks linked with the use of sniffer dogs when recreational drug users consume all their drugs at once, before going to a party, or make other efforts to avoid carrying drugs in public spaces, but do not stop using drugs.

*Rather than inhibiting drug intake, the use of sniffer dogs could serve to increase dangerous illicit drug consumption habits, conflicting with the harm minimisation approach that is Government policy, and which I strongly support.*¹³⁵⁷

A member of the public made the following comment on an international message board where issues of responsible drug use are discussed. The particular 'thread' (topic of discussion) related to changes in drug use behaviour as a result of drug detection dogs:

I am also aware of at least several occasions whereby people are consuming large amounts of drugs before they enter a venue in order to avoid sniffer dogs at the entrance. Such a practice runs contrary to the explicated harm-reduction policy that the NSW Government has. I am aware of at least one hospitalisation that has resulted from this practice.

*Sniffer dogs will not stop drugs being taken in clubs or at raves, but will merely force people to consume more drugs in a shorter time period in order to diminish the possibility of detection.*¹³⁵⁸

The AIDS Council of NSW noted various changes in drug use behaviours:

Since the use of drug detector dogs we have noted alarming changes in patterns and modes of administration, especially in relation to the use of meth-amphetamine (crystal). Previously, people would smoke a small initial amount of 'crystal' and 'top up' as required during the course of the evening. Clients have reported that now rather than risk detection, they will now smoke or inject the entire overall volume before leaving their homes to go out.

*Moving from administering smaller doses over a longer period of time to larger doses over shorter period greatly increases the risk of adverse reactions, particularly in relation to speed-psychosis. There are also a range of other health impacts associated with increased usage of this type, and concerns about risk of blood borne viruses from uptake of injecting.*¹³⁵⁹

A member of the public also observed a change in drug use patterns:

*[The use of drug detection dogs] creates an atmosphere of fear, in which people are more likely to take their drugs before heading out, increasing the risk of overdosing and encouraging behaviour that runs contrary to harm minimisation practices advocated by health professionals across the country.*¹³⁶⁰

Another member of the public reported the experience of friends who:

*confirm that fear of sniffer dogs leads clubgoers either to take all their drugs before leaving home instead of pacing them out over an evening, or to buy untested substances of unknown quality from strangers at their destination. ... One friend who frequents the Oxford St clubs pointed out that this trend meant people were more likely to obtain and use a genuinely dangerous drug – GHB, and to take more of it at a time.*¹³⁶¹

The switch to more dangerous drugs as a result of drug detection dog operations was identified by a number of individuals and organisations. For example, a drug educator we interviewed noted that some drug users had moved from ecstasy to the potentially more risky and dangerous drug GHB due to fear of being detected with ecstasy. The move to GHB was attributed to the belief by users that drug detection dogs were unable to detect GHB.¹³⁶²

Dr Alex Wodak also commented on the possible negative consequence of drug detection dogs whereby drug users move to:

*odour-free drugs that are more compact and easier to conceal and easier to evade detection, and they are often more dangerous.*¹³⁶³

Reverend Ray Richmond of the Wayside Chapel in Kings Cross informed Ms Clover Moore MP that he was:

*aware of some unintended outcomes of the use of sniffer dogs among illegal drug users, causing users to change their drug of choice to substances that are not easily detected and are more dangerous and problematic for the user.*¹³⁶⁴

The perception that drug detection dogs were more efficient in the detection of cannabis may have resulted in drug users switching from cannabis to other drugs which users believed would be less likely to be detected. For example, the AIDS Council of NSW informed us that they had received:

*reports about concerns in relation to detection of cannabis [by drug detection dogs] resulting in a shift from cannabis to 'come down' from ecstasy and other drug use, to increased use of benzodiazepines (valium, temazepam, etc), because these may be carried legitimately. Use of benzodiazepines is seen as less harmful because of their licit nature, but they have a high addictive potential and may potentiate reliance on amphetamines as well (one is used to counteract the effects of the other).*¹³⁶⁵

*Reports from ACON's NSP [Needle and Syringe Program] indicate a greater volume of black-market trade and uptake of injection of 'over the counter' pharmaceutical drugs, which are not detectable by drug detection dogs. ... These substances are generally more difficult to inject without adequate filtration (i.e. pill filters) that are unavailable to most people who inject them. The result is an increase in associated health issues, such as vein damage and dependence. Injecting of oily substances such as benzodiazepine gel caps increases the likelihood of embolism resulting in venous damage and tissue necrosis commonly requiring amputation of fingers, toes, hands and feet.*¹³⁶⁶

The move away from cannabis was also noted by NUAA:

*NUAA interviews also support evidence from frontline community services which confirms drug users are less likely to carry cannabis and more likely to use pills if aware of local drug dog operations.*¹³⁶⁷

Similarly, the Hepatitis C Council of NSW commented that:

*Drug substitution could occur as a result of people realising that it is cannabis that sniffer dogs are most likely to detect. They might therefore decide to carry and use other, perhaps more harmful drugs, in place of cannabis, if those other drugs have a lower likelihood of detection.*¹³⁶⁸

A number of submissions referred to the possibility that drug detection dog operations may actually increase drug dealing at licensed premises and dance parties. For example, the UTS Community Law Centre noted that:

*People obtaining drugs for a group of people are likely to buy drugs like ecstasy from a regular source. In order to avoid a search, however, users may be in a situation where they choose only to purchase drugs at the point of consumption. This deprives people of valuable knowledge of the tablet type or the supplier, and they lose the benefits of experience from friends about the effect and safety of the drug.*¹³⁶⁹

Ms Lee Rhiannon MLC noted that:

*the threat of encountering sniffer dogs leads clubgoers either to consume all of their drugs before leaving home instead of pacing them out over an evening, or to buy untested substances of unknown quality from strangers at their destination.*¹³⁷⁰

15.10.3. Change in locations where drugs consumed

The use of drug detection dogs may also result in users changing the location where they consume drugs. Redfern Legal Centre noted some of the potential adverse consequences that may result from users being forced to consume drugs in alternate locations:

*Clearly, if drug detection operations are carried out in such a way that they thwart the aims and effectiveness of the MSIC and other safe-injecting facilities, then dependent users will continue to inject elsewhere (in unhygienic, uncontrolled and unsupervised circumstances) and the risk of overdosing, contracting blood-borne diseases from unsafe needle-sharing practices and susceptibility to other elements of crime and other 'harder' drugs will escalate.*¹³⁷¹

Similarly, NUAA commented that:

*research on the displacement effect of drug detection dog operations reveals that safe, hygienic and well lit locations for use are being abandoned for unsafe and unhygienic locations.*¹³⁷²

The AIDS Council of NSW reported on the practice of users:

*driving to night clubs and venues in order to avoid detection when carrying small amounts of recreational drugs, returning to their cars to 'top up' during the course of the evening and then driving home at the end of the night.*¹³⁷³

The AIDS Council of NSW also noted some of the potential adverse consequences as a result of people taking drugs at home:

people using excessive amounts of recreational drugs before leaving home must negotiate the way from their residence to the social venue or event whilst intoxicated and are therefore placed at greater risk of accident or violence.

*Clients have also reported that fear of contact with drug detection dogs has resulted in increased substance use alone at home, rather than as a social activity in the company of friends who may be of assistance during the course of an adverse event, for example amphetamine related paranoia. Use of cannabis alone at home is linked with a-motivational syndrome, resulting in social withdrawal and increased dependency issues.*¹³⁷⁴

A member of the public also commented on the possible impact of users consuming drugs at home before attending an entertainment venue:

*The behaviour pattern of some of these drug users is or was, to have their drug(s) on them, some probably in possession in a few different ones, and then using the drug(s) when they feel in a "safe" environment in the company of friends. Through the use of sniffer dogs the behaviour changed, so that now people were taking their drugs at home, feeling the effect already while they were still on their way to the venue and endangering themselves as well as others.*¹³⁷⁵

15.10.4. Discussion

There is strong anecdotal evidence that the deployment of drug detection dogs may be placing some drug users, especially young ecstasy and related drug users, at increased risk of drug-related harm. It must be accepted that some drug users in possession of small amounts of drugs for personal use will take steps to avoid detection due to fear of the consequences of being apprehended with prohibited drugs. Such evasive action often results in more dangerous drug consumption such as taking larger amounts of drugs before leaving home, or swallowing all drugs when confronted by a drug detection dog.

In our view, police should specifically consider ways in which drug-related harm might be reduced as a result of drug detection dog operations. Such consideration should involve an evaluation of the intended benefit of an operation versus the potential for drug-related harm as a consequence of the operation. We recognise that balancing the competing objectives of drug law enforcement on the one hand, and harm reduction on the other is complex. However, consistent with a commitment to harm minimisation, the reduction of harm flowing from drug detection dog operations should be a guiding principle when considering the merits of conducting an operation.

Drug education campaigns highlighting the dangers associated with risky drug use behaviour (such as taking large quantities of drugs at once) may go some way toward addressing the potential for harm. Further, the extension of diversionary schemes, which provide drug information, education and/or referral, may also help reduce the impact of drug detection dog operations. Furthermore, the introduction of random drug testing of drivers may act as a deterrent to drug users who consume drugs and then drive to entertainment venues. However, at the end of the day there must be some acknowledgment that drug detection dog operations mostly result in the apprehension of drug users (and not suppliers) with small amounts of drugs for personal use and that these people may take risky and dangerous steps in order to avoid detection.

15.11. Impact of drug detection dogs on recorded crime

The use of drug detection dogs in public places has the potential to reduce drug-related crime, which results in a reduction in harm to the individual drug user and the community in which the drug user lives. For example, operations involving drug detection dogs may discourage persons from engaging in drug offences. Furthermore, high visibility police patrols may deter persons from committing drug-related property offences such as break and enter, stealing, and robbery.

15.11.1 Drug offences

We examined recorded offences on the Judicial Information Research System database to determine whether there was any change in the number of offences in relation to the possession and supply of prohibited drugs.

We looked at data for the two years April 2000 to March 2002 and compared this to data for the period April 2002 to March 2004, which roughly corresponded to the period of our review (22 February 2002 to 21 February 2004).

We discovered that in relation to possession of prohibited drugs, there were percentage drops in possess cannabis (-13.4%), possess meth/amphetamine (-14.0%), possess heroin (-44.8%), and possess cocaine (-48.4%) offences. However, there was a dramatic increase in possess ecstasy (+60.2%) offences. In relation to supply of prohibited drugs, there were percentage drops in supply cannabis (-12.4%), supply heroin (-6.9%), and supply cocaine (-6.8) offences. However, there was a dramatic increase in relation to supply ecstasy (+58.3%), and an increase in supply meth/amphetamine (+28.7%).

It is difficult to make any definitive statements about the impact of drug detection dogs on drug offences. It might be expected that there would be an increase in the number of drug offences detected as a result of policing activity with drug detection dogs. It appears, however, that the overall downward trend in drug use noted in the *2004 National Drug Strategy Household Survey* might have influenced the overall number of drug offences. In this respect it is not possible to determine the deterrent effect of drug detection dogs or whether they contributed to the general downward trend in drug offences. It is possible that other policing strategies or government initiatives may have influenced these trends.

It is worth noting that the upward trend in possess and supply ecstasy offences coincides with the increased consumption of ecstasy in NSW. According to the *2004 National Drug Strategy Household Survey*, ecstasy consumption appears to be increasing with 3.5% of persons aged 14 and over reporting ecstasy use in the last 12 months, which is up from 2.1% in 1998.¹³⁷⁶

We can say with confidence that drug detection dog operations have increased the number of supply ecstasy offences recorded for the review period. As discussed in Chapter 13 'Targeting drug supply', the majority of proven supply cases involved the 'technical' supply of drugs to partners and/or friends at entertainment venues where ecstasy consumption is prevalent. However, it is difficult to assess more generally the impact of drug detection dogs on the well-established channels of ecstasy supply between friends and acquaintances.¹³⁷⁷

15.11.2. Drug-related crime

Recent crime statistics demonstrate significant downward trends in reported incidents of property crime usually associated with drug use such as robbery, break and enter, and stealing.¹³⁷⁸ It is difficult to make any definitive statements about the impact of drug detection dogs on these trends.

Interestingly, a recent report by the NSW Bureau of Crime Statistics and Research argued that the downward trend in property crime might not be a direct result of policing activity, but to several other unrelated factors including the fall in the availability of heroin, an increase in average weekly earnings, an increase in the number of heroin users re-entering methadone and other treatment programs, an increase in the imprisonment rate for convicted burglars and possibly, a fall in long term unemployment.¹³⁷⁹

15.11.3. Evidence of the impact of drug detection dogs

There is little evidence to suggest that crime rates have fallen as a direct result of drug detection dog operations. However, it is possible that drug detection dog operations may have had some short-term impact on local crime due to the highly visible nature of police patrols involving dogs.

One senior officer we interviewed noted that drug detection dog operations appeared to be associated with a drop in local crime. The officer stated that there was anecdotal evidence that there were less drugs on the streets.¹³⁸⁰

We asked NSW Police if there was any specific evidence of drug detection dog operations contributing to a decrease in local crime.¹³⁸¹ NSW Police responded by saying:

*Drug detection dogs are deployed upon request for assistance from operation commanders and reporting on results is limited to what occurred or was detected during the operation. It is therefore impossible to differentiate the impact of the drug detection dogs from general police operations.*¹³⁸²

Endnotes

- ¹¹²⁴ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, Canberra, April 2005.
- ¹¹²⁵ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, Canberra, April 2005.
- ¹¹²⁶ Australian Institute of Health and Welfare, *Statistics on drug use in Australia 2004*, Canberra, July 2005.
- ¹¹²⁷ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results*, Canberra, April 2005.
- ¹¹²⁸ NSW Council for Civil Liberties submission, 19 August 2004.
- ¹¹²⁹ Ministerial Council on Drugs Strategy, *The National Drug Strategy: Australia's Integrated Framework 2004-2009*, Commonwealth of Australia, Canberra, (2004).
- ¹¹³⁰ Ministerial Council on Drugs Strategy, *The National Drug Strategy: Australia's Integrated Framework 2004-2009*, Commonwealth of Australia, Canberra, (2004), p.2.
- ¹¹³¹ Trace M, Roberts M, & Klein A, *Assessing Drug Policy Principles and Practice*, DrugScope & The Beckley Foundation, Report 2, United Kingdom, (2004), p.13
- ¹¹³² For a comprehensive list of harms see: Appendix B 'Health effects of licit and illicit drugs' in Macintosh A, *Drug Law Reform: Beyond Prohibition*, Discussion Paper 83, The Australia Institute, February 2006.
- ¹¹³³ Ministerial Council on Drugs Strategy, *National Drug Strategic Framework 1988-99 to 2002-03: Building Partnerships*, Commonwealth of Australia, Canberra, (1998), pp.9-11.
- ¹¹³⁴ Ministerial Council on Drugs Strategy, *The National Drug Strategy: Australia's Integrated Framework 2004-2009*, Commonwealth of Australia, Canberra, (2004), p.5.
- ¹¹³⁵ NSW Police, *The Needle and Syringe Program, Guidelines for Police*, p.1 and *Methadone and Other Pharmacotherapies, Guidelines for Police*, p.1. Policies provided August 2005.
- ¹¹³⁶ Spooner C, McPherson M, & Hall W, *The role of police in preventing and minimising illicit drug use and its harms*, National Drug Law Enforcement Research Fund, (2004).
- ¹¹³⁷ Spooner C, McPherson M, & Hall W, *The role of police in preventing and minimising illicit drug use and its harms: Strategic issues for drug law enforcement policy makers at the jurisdictional level*, National Drug Law Enforcement Research Fund, (2004).
- ¹¹³⁸ NSW Police Drug and Alcohol Coordination Unit, *MERIT Group Training Notes* session plan and accompanying slides – provided August 2005.
- ¹¹³⁹ NSW Government, *NSW Illicit Drug Law Enforcement Performance Indicators*, April 2002, p.5.
- ¹¹⁴⁰ NSW Government, *NSW Illicit Drug Law Enforcement Performance Indicators*, April 2002, p.6.
- ¹¹⁴¹ Royal Australasian College of Physicians & Royal Australian and New Zealand College of Psychiatrists, *Illicit Drugs Policy: Using evidence to get better outcomes*, Sydney, (2004), pp.26-7.
- ¹¹⁴² Dr Alex Wodak interview, June 2004.
- ¹¹⁴³ Fairfield City Council submission, 25 August 2004.
- ¹¹⁴⁴ Weatherburn D, 'Performance Indicators for Drug Law Enforcement', *Contemporary Issues in Criminal Justice – Crime and Justice Bulletin*, No: 48, (2000), p.3.
- ¹¹⁴⁵ NSWPD, Legislative Council, 6 December 2001, p.19745.
- ¹¹⁴⁶ NSWPD, Legislative Council, 6 December 2001, p.19879.
- ¹¹⁴⁷ Ministry for Police submission, 30 August 2004.
- ¹¹⁴⁸ Ministry for Police submission, 30 August 2004.
- ¹¹⁴⁹ NSW Users and AIDS Association submission, 17 August 2004.
- ¹¹⁵⁰ Youth Justice Coalition, 20 August 2004.
- ¹¹⁵¹ Tony Trimmingham, Family Drug Support submission, 6 August 2004.
- ¹¹⁵² Office of the Director of Public Prosecutions submission, 4 August 2004.
- ¹¹⁵³ Redfern Legal Centre submission, 20 August 2004.
- ¹¹⁵⁴ Dr Ingrid van Beek interview, April 2004.
- ¹¹⁵⁵ van Beek I, *In the eye of the needle: Diary of a Medically Supervised Injecting Centre*, Allen & Unwin, Sydney, (2004), p.38.
- ¹¹⁵⁶ Paul Dillon interview, July 2004.
- ¹¹⁵⁷ Police Focus Group 2, August 2004.
- ¹¹⁵⁸ Police Focus Group 2, August 2004.
- ¹¹⁵⁹ Police Focus Group 2, August 2004.

- 1160 Police Focus Group 1, July 2004.
- 1161 Police Focus Group 3, August 2004.
- 1162 Police Focus Group 1, July 2004.
- 1163 Police Focus Group 1, July 2004.
- 1164 Crime Manager (endorsed by Commander), Western Sydney Command submission, 31 July 2004.
- 1165 Crime Manager (endorsed by Commander), Western Sydney Command submission, 31 July 2004.
- 1166 Police Focus Group 4, May 2004.
- 1167 Police Focus Group 3, August 2004.
- 1168 Police Focus Group 3, August 2004.
- 1169 Police Focus Group 4, May 2004.
- 1170 Police Focus Group 4, August 2004.
- 1171 Interview with senior police officer, May 2004.
- 1172 Police Focus Group 3, August 2004.
- 1173 Police Focus Group 3, August 2004.
- 1174 Interview with senior police officer, May 2004.
- 1175 Paul Dillon interview, July 2004.
- 1176 Interview with senior police officer, March 2004.
- 1177 For more detailed information on drug diversion schemes in NSW see: Johns R, 'Drug Offences: An Update on Crimes Trends, Diversionary Programs and Drug Prisons', Briefing Paper No 7/04, NSW Parliamentary Library Research Service, May 2004; NSW Attorney General's Department, 'Drug-Crime Diversion', Information Sheet, Crime Prevention Division, (2006).
- 1178 NSW Drug Summit 1999 Communiqué, 21 May 1999.
- 1179 For more information on MERIT see: Fact Sheet: 'Magistrates Early Referral Into Treatment Program (MERIT)', http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_resources.
- 1180 For a comprehensive overview of schemes operating in Australia see Appendix A 'Pre-arrest diversion programs for minor cannabis offences committed by adults' in Macintosh A, *Drug Law Reform: Beyond Prohibition*, Discussion Paper 83, The Australia Institute, February 2006. See also: NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp. 26-8.
- 1181 NSW Police Response to Questions on Notice – Commonwealth Parliament Committee on Legal and Constitutional Affairs, Crime in the Community Inquiry, February 2003, p.2.
- 1182 This is not a full list of the cannabis cautioning criteria. Information obtained from 'New South Wales Police Service Cannabis Cautioning Scheme' pocket guide.
- 1183 Information obtained from 'New South Wales Police Service Cannabis Cautioning Scheme' pocket guide.
- 1184 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004).
- 1185 See *Police v Darby* (Jerram DCM, Unreported, Downing Centre Local Court, 21 November 2001).
- 1186 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.vii.
- 1187 Concerns raised at a consultation with community and legal groups, 21 March 2002.
- 1188 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.4.
- 1189 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.38.
- 1190 We have not included as 'caution-able items' all incidents in which drug implements were found as we cannot be sure such implements related to cannabis rather than other drugs,. We have only included drug implements where a cannabis caution was issued for the implement.
- 1191 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.vii.
- 1192 The Shopfront Youth Legal Centre submission, 9 August 2004.
- 1193 It appears that 28 young people were mistakenly issued cannabis cautions although they were ineligible.
- 1194 COPS Event 15.1
- 1195 COPS Event 15.2. See paragraph 13.6.6 for a detailed explanation of the effect of section 10 of the *Crimes (Sentencing Procedure) Act 1999*.
- 1196 COS Event 15.3.
- 1197 COPS Event 15.4.
- 1198 National Drug and Alcohol Research Centre, National Cannabis Strategy Consultation Paper, <http://ndarc.med.unsw.edu.au/ndarc.nsf/website/News>, (Accessed 12 September 2005).
- 1199 Judicial Information Research System (JIRS) database, Comparison of number of sentences handed down between April 2000 – March 2002 and April 2002 to March 2004.
- 1200 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.32.
- 1201 Baker J & Goh D, *The Cannabis Cautioning Scheme Three Years On: An Implementation and outcome evaluation*, NSW Bureau of Crime Statistics and Research, (2004), p.32.
- 1202 Paul Dillon interview, July 2004.
- 1203 Court Attendance Notice.
- 1204 Field Court Attendance Notice.
- 1205 COPS Event 15.9; Charge 15.3.
- 1206 COPS Event 15.10; Charge 15.4.
- 1207 The *Young Offenders Act 1997* (NSW) makes provision for diversion from court for some young offenders found in possession of small amounts of prohibited drugs. For more information on diversion programs in other states and territories see: "Illicit Drug Diversion Initiative – COAG Framework", Australian Government – Department of Health and Ageing, <http://www.health.gov.au/internet/wcms/>

- publishing.nsf/Content/health-publth-strateg-drugs-illicit-diversion-coag.htm, (Accessed 15 September 2005); Australian Institute of Criminology, 'Australian responses to illicit drugs: Pre-court diversion', <http://www.aic.gov.au/research/drugs/responses/diversion.html>, (Accessed 15 September 2005).
- 1208 Research and Prevention Division of the Criminal Justice Commission, *Police Cautioning of Adults: Drug and Other Offences: A briefing paper*, Criminal Justice Commission, Brisbane, April 1999, p.6.
- 1209 Drug Programs Unit, *Confidential Options Paper*, NSW Police, August 2000, p.1.
- 1210 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program: A Report prepared for the Drugs and Health Protection Services Branch*, Public Health Division, Department of Human Services, September 1999, Department of Human Services, Victoria, p.14.
- 1211 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program: A Report prepared for the Drugs and Health Protection Services Branch*, Public Health Division, Department of Human Services, September 1999, Department of Human Services, Victoria, pp.17, 24, 25, 34.
- 1212 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program: A Report prepared for the Drugs and Health Protection Services Branch*, Public Health Division, Department of Human Services, September 1999, Department of Human Services, Victoria, p.24.
- 1213 Much of the commentary about the DOCTP trial has been obtained through discussions with police who were involved in the implementation or assessment of the trial.
- 1214 Results Spreadsheet, 22 February 2002 to 21 February 2004.
- 1215 This compares with 77% of the cannabis only group having a criminal record at the time the matter went to court. This is unsurprising because many of those without criminal convictions would have received cannabis cautions.
- 1216 On 4 occasions drug amounts were not recorded.
- 1217 Results Spreadsheet, 22 February 2002 to 21 February 2004.
- 1218 For our analysis of supply transcripts, see Chapter 13 'Targeting drug supply'.
- 1219 Only one person pleaded not guilty.
- 1220 A dismissal under s.10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*. See paragraph 13.6.6 for a detailed explanation of the effect of s.10.
- 1221 No conviction recorded includes section 10 dismissals with and without bond, and the rising of the court.
- 1222 Redfern Legal Centre submission, 20 August 2004.
- 1223 Office of the Director of Public Prosecutions submission, 4 August 2004.
- 1224 NSW Police have also recently begun using 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. For more information see: NSW Ombudsman, *On the spot justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005.
- 1225 The Shopfront Youth Legal Centre submission, 9 August 2004.
- 1226 Police Association of New South Wales submission, 19 August 2004.
- 1227 Police Focus Group 1.
- 1228 Police Focus Group 4.
- 1229 Police Focus Group 1, July 2004.
- 1230 Police Focus Group 1, July 2004.
- 1231 Police Focus Group 3, August 2004.
- 1232 Police Focus Group 4, May 2004.
- 1233 Police Focus Group 4, May 2004.
- 1234 Cameron Duff (Australian Drug Foundation) interview, April 2004.
- 1235 Dr Alex Wodak interview, June 2004.
- 1236 Paul Dillon interview, July 2004.
- 1237 Dr Simon Lenton (National Drugs Research Institute) interview, April 2004.
- 1238 Nicky Bath interview, April 2004.
- 1239 NSW Attorney General's Department, *Regulatory Impact Statement: Criminal Records Regulation 2004*, July 2004.
- 1240 In their submission the NSW Council for Civil Liberties noted that many people who pleaded to guilty to charges of possess prohibited drug following the drug dog operation at the 2004 Big Day Out concert, 'were in their twenties and thirties. Most were employed and some had young families. They were unrepresented and this was the first time most had ever been to court, let alone charged with a criminal offence'.
- 1241 Erickson P G, & Fischer B, 'Canadian cannabis policy: The impact of criminalization, the current reality and future policy options', Paper presented at the International Symposium on Cannabis Policy, Criminal Law and Human Rights, Bremen, Germany, 5-7 October 1995.
- 1242 Erickson P G & Fischer B, 'Canadian cannabis policy: The impact of criminalization, the current reality and future policy options', Paper presented at the International Symposium on Cannabis Policy, Criminal Law and Human Rights, Bremen, Germany, 5-7 October 1995.
- 1243 Erickson P G, & Fischer B, 'Canadian cannabis policy: The impact of criminalization, the current reality and future policy options', Paper presented at the International Symposium on Cannabis Policy, Criminal Law and Human Rights, Bremen, Germany, 5-7 October 1995, p.4.
- 1244 Australian Law Reform Commission, *Spent Convictions*, Report No. 37, (1987).
- 1245 See, for example, Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion paper, December 2004; Graffam J, Shinkfield A, Lavelle B, & Hardcastle L, *Attitudes of employers, corrective services workers, employment support workers and prisoners and offenders towards employing ex-prisoners and ex-offenders*, Criminology Research Council, April 2004; Pager D, 'The Mark of a Criminal Record', *American Journal of Sociology* 108(5), March 2003, pp.937-975; Holzer H J, Raphael S, & Stoll M, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks and their Determinants*, Institute of Business and Economic Research, University of California, Berkeley: Working Paper No. W01-005, October 2001; Metcalf H, Anderson T & Rolfe H, *Barriers to employment for offenders and ex-offenders*, Research Report No. 155, US Department for Work and Pensions, 2001, pp.110-113; Lenton S & Heale P, 'Arrest, court and social impacts of conviction for a minor cannabis offence under strict prohibition', *Contemporary Drug Problems* (27), (2000), pp.805-833; Lenton S, Bennett M and Heale P, *The Social Impact of a Minor Cannabis Offence Under Strict Prohibition – The Case of Western Australia*, Curtin University of Technology, National Centre for Research into the Prevention of Drug Abuse, Perth, (1999).

- 1246 Australian Law Reform Commission, Report No. 37, *Spent Convictions*, (1987), p.3
- 1247 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion paper, December 2004, p.7.
- 1248 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion paper, December 2004, p.8.
- 1249 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion paper, December 2004. p.7.
- 1250 Rickard M, 'Reforming the Old and Refining the New: A Critical Overview of Australian Approaches to Cannabis', Research Paper 6 2001-2002, Parliament of Australia, p.15.
- 1251 Rickard M, 'Reforming the Old and Refining the New: A Critical Overview of Australian Approaches to Cannabis', Research Paper 6 2001-2002, Parliament of Australia, p.28.
- 1252 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program*, September 1999, p.26.
- 1253 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program*, September 1999, p.26.
- 1254 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program*, September 1999, p.26.
- 1255 Lenton S & Single E, 'The definition of harm reduction', *Drug and Alcohol Review*, Vol 17, (1998), 213-220, p.218.
- 1256 Various attempts have been made to do so in Australia. Cleeland (1989) and Marks (1991) are the most commonly cited reliable studies.
- 1257 McDonald D & Atkinson L, *Social Impacts of the Legislative Options for Cannabis in Australia, Phase 1 Research Report to the National Drug Strategy Committee*, Australian Institute of Criminology, (1995).
- 1258 Marks R E, 'What Price Prohibition? An Estimate of the Costs of Australian Drug Policy', *Australasian Journal of Management*, 16, December 1991, pp.195-196.
- 1259 McLeod Nelson and Associates Pty Ltd, *Evaluation of the Drug Diversion Pilot Program*, September 1999, p.18.
- 1260 Standing Committee on Family and Community Affairs, *Road to Recovery – Report on the Inquiry into Substance Abuse in Australian Communities*, Commonwealth of Australia, September 2003, at 8.98.
- 1261 NSW Police response to draft final report, 10 March 2006.
- 1262 Correspondence from Robyn Kruk, Director General, NSW Health, 15 February 2006.
- 1263 Correspondence from the Hon. Bob Debus, Attorney General, 30 January 2006.
- 1264 Correspondence from the Hon. Bob Debus, Attorney General, 30 January 2006.
- 1265 van Beek I, 'The Sydney Medically Supervised Injecting Centre: A Clinical Model', *Journal of Drug Issues*, Summer 2003, 625-638, p.625
- 1266 MSIC Evaluation Committee. (2003). *Final Report of the evaluation of the Sydney Medically Supervised Injecting Centre*. Sydney: authors.
- 1267 van Beek I, 'The Sydney Medically Supervised Injecting Centre: A Clinical Model', *Journal of Drug Issues*, Summer 2003, 625-638, p.625.
- 1268 MSIC Evaluation Committee. (2003). *Final Report of the evaluation of the Sydney Medically Supervised Injecting Centre*. Sydney: authors.
- 1269 NSWPD, Legislative Assembly, 6 December 2001, p.19879.
- 1270 Correspondence from Ms Clover Moore MP, Member for Bligh, 4 December 2002.
- 1271 Dr Ingrid van Beek interview, April 2004.
- 1272 Dr Ingrid van Beek interview, April 2004.
- 1273 NSW Police comment on draft copy of Discussion Paper, 8 June 2004, p.11.
- 1274 Ministry for Police submission, 30 August 2004.
- 1275 Dr Ingrid van Beek interview, April 2004.
- 1276 Dr Ingrid van Beek interview, April 2004.
- 1277 NSW Police, *Medically Supervised Injecting Centre – Police Service Guidelines*, provided September 2005.
- 1278 NSW Police, *Medically Supervised Injecting Centre – Police Service Guidelines*, provided September 2005.
- 1279 Police Association of NSW submission, 19 August 2004.
- 1280 Paul Dillon interview, July 2004.
- 1281 Tony Trimmingham, Family Drug Support submission, 6 August 2004.
- 1282 The Shopfront Youth Legal Centre submission, 9 August 2004.
- 1283 Redfern Legal Centre submission, 20 August 2004.
- 1284 Redfern Legal Centre submission, 20 August 2004.
- 1285 Intravenous drug users focus group, July 2004.
- 1286 AIDS Council of NSW submission, 30 August 2004.
- 1287 UTS Community Law submission, 19 August 2004.
- 1288 Hepatitis C Council of NSW submission, 12 August 2004.
- 1289 NSW Users and AIDS Association submission, 17 August 2004.
- 1290 The Shopfront Youth Centre submission, 9 August 2004.
- 1291 Charge 15.1.
- 1292 COPS Event 15.7.
- 1293 Charge 15.2.
- 1294 COPS Event 15.8.
- 1295 Lind B, Chen S, Weatherburn D & Mattick R, 'The effectiveness of methadone maintenance treatment in controlling crime: An aggregate-level analysis', *Crime and Justice Statistics*, Bureau of Crime Statistics and Research, March 2004.
- 1296 Dr Alex Wodak interview, June 2004.
- 1297 Dr Alex Wodak interview, June 2004.
- 1298 Interview with senior police officer, July 2004.
- 1299 The Youth Justice Coalition, 20 August 2004.
- 1300 NSW Council for Civil Liberties submission, 19 August 2004.
- 1301 UTS Community Law submission, 19 August 2004.
- 1302 Dr Andrew Byrne submission, 2 August 2004.

- 1303 Dr Andrew Byrne telephone message, 1 July 2004.
- 1304 NSW Council for Civil Liberties submission, 19 August 2004.
- 1305 See Chapter 10 'Drug detection warrants and police intelligence' at paragraph 10.3 for a more detailed discussion of drug detection warrants.
- 1306 NSW Council for Civil Liberties submission, 19 August 2004.
- 1307 See Chapter 10 'Drug detection warrants and police intelligence' at paragraph 10.4 for a discussion of our audit of intelligence information to support requests for the deployment of drug detection dogs.
- 1308 Request number 13.
- 1309 Request number 14.
- 1310 Information Report 15.1.
- 1311 Information Report 15.2.
- 1312 Information Report 15.3.
- 1313 NSW Users and AIDS Association submission, 17 August 2004.
- 1314 Interview with senior police officer, May 2004.
- 1315 Interview with manager of methadone clinic, June 2004.
- 1316 Youth Justice Coalition submission, 20 August 2004.
- 1317 NSW Police response to draft final report, 10 March 2006.
- 1318 NSW Police response to draft final report, 10 March 2006.
- 1319 Interview with senior police officer, May 2004.
- 1320 Paul Dillon interview, July 2004.
- 1321 Dr Alex Wodak interview, June 2004.
- 1322 NSW Police response to draft final report, 10 March 2006.
- 1323 NSW Police response to draft final report, 10 March 2006.
- 1324 NSW Council for Civil Liberties submission, 19 August 2004.
- 1325 COPS Event 15.5.
- 1326 COPS Event 15.6.
- 1327 Police Focus Group 1, July 2004.
- 1328 *Poisons and Therapeutic Goods Act 1966*, s.16.
- 1329 NSW Police response to draft final report, 10 March 2006.
- 1330 Cited in Johns R, 'Medical Cannabis Programs: A Review of Selected Jurisdictions', NSW Parliamentary Library Research Service, No: 10/04, August 2004, p.15. See also Griffith G & Swain M, 'The Medical Use of Cannabis: Recent Developments', NSW Parliamentary Library Research Service, Briefing Paper No: 11/99, May 1999.
- 1331 Johns R, 'Medical Cannabis Programs: A Review of Selected Jurisdictions', NSW Parliamentary Library Research Service, Briefing Paper No: 10/04, August 2004, pp.16-17.
- 1332 Johns R, 'Medical Cannabis Programs: A Review of Selected Jurisdictions', NSW Parliamentary Library Research Service, Briefing Paper No: 10/04, August 2004, p.1.
- 1333 HIV treatments policy officer interview, April 2004.
- 1334 AIDS Council of NSW submission, 30 August 2004.
- 1335 Member of public submission, 30 June 2004.
- 1336 Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and territory supplement*, Canberra, June 2005, p.10.
- 1337 Moore T, 'The cold nose of the law', *Sydney Star Observer*, Issue 599, 28 February 2002.
- 1338 Paul Dillon interview, July 2004.
- 1339 Paul Dillon interview, July 2004.
- 1340 NSW Users and AIDS Association submission, 17 August 2004.
- 1341 NSWPD, Legislative Assembly, 6 December 2001, p.19881.
- 1342 See Chapter 12 'Privacy, civil liberties and police relations with the community' at paragraph 12.7.3 for more details on the fear of crime surveys that were conducted as part of the review.
- 1343 Fear of crime survey respondent 43.
- 1344 Fear of crime survey respondent 111.
- 1345 Fear of crime survey respondent 77.
- 1346 Licensee interview, Inner Sydney Hotel, November 2002.
- 1347 UTS Community Law submission, 19 August 2004, footnotes omitted.
- 1348 Youth Justice Coalition submission, 20 August 2004.
- 1349 Hepatitis C Council of NSW submission, 12 August 2004.
- 1350 Redfern Legal Centre submission, 20 August 2004.
- 1351 NSW Council for Civil Liberties submission, 19 August 2004.
- 1352 The Shopfront Youth Legal Centre submission, 9 August 2004.
- 1353 Posted 9 July 2004, <http://www.bluelight.nu>, (Accessed 5 August 2004).
- 1354 Maher S, 'Summer party crackdown', *Sydney Star Observer*, Issue 599, 28 February 2002.
- 1355 Police Focus Group 1, July 2004.
- 1356 *Sydney Star Observer*, 28 July 2001 cited in Moore T, '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>.
- 1357 Ms Clover Moore MP submission, 9 August 2004.
- 1358 Posted 12 August 2004, <http://www.bluelight.nu>, (Accessed 27 August 2004).
- 1359 AIDS Council of NSW submission, 30 August 2004.
- 1360 T. Benzie submission, 2 July 2004.
- 1361 M. Gormly submission, 8 August 2004.

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- ¹³⁶² Paul Dillon interview, July 2004.
- ¹³⁶³ Dr Alex Wodak interview, 30 June 2004
- ¹³⁶⁴ See NSWPD, Legislative Assembly, 6 December 2001, p.19881.
- ¹³⁶⁵ AIDS Council of NSW submission, 30 August 2004.
- ¹³⁶⁶ AIDS Council of NSW submission, 30 August 2004.
- ¹³⁶⁷ NSW Users and AIDS Association submission, 17 August 2004.
- ¹³⁶⁸ Hepatitis C Council of NSW, submission, 12 August 2004.
- ¹³⁶⁹ UTS Community Law submission, 19 August 2004.
- ¹³⁷⁰ Ms Lee Rhiannon MLC submission, 9 August 2004.
- ¹³⁷¹ Redfern Legal Centre submission, 20 August 2004.
- ¹³⁷² NSW Users and AIDS Association submission, 17 August 2004.
- ¹³⁷³ AIDS Council of NSW submission, 30 August 2004.
- ¹³⁷⁴ AIDS Council of NSW submission, 30 August 2004.
- ¹³⁷⁵ CM, private individual submission, 9 August 2004.
- ¹³⁷⁶ Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and territory supplement*, Canberra, June 2005.
- ¹³⁷⁷ For information on the nature of the illicit drug market see paragraph 13.11 'Impact on drug markets'.
- ¹³⁷⁸ Moffat S, Goh D, & Fitzgerald J, *New South Wales Recorded Crime Statistics 2004*, NSW Bureau of Crime Statistics and Research, (2005).
- ¹³⁷⁹ Moffat S, Weatherburn D, & Donnelly N, 'What caused the recent drop in property crime?', *Crime and Justice Bulletin*, No: 85, NSW Bureau of Crime Statistics and Research, February 2005.
- ¹³⁸⁰ Interview with senior police officer, July 2004.
- ¹³⁸¹ Request for additional information correspondence to NSW Police, 23 February 2005.
- ¹³⁸² Correspondence from NSW Police, 18 April 2005.

Chapter 16. Cost effectiveness

A critical question in assessing the costs and benefits of police implementation of the Drug Dogs Act is whether using the drug detection dogs for general drug detection represents an efficient use of police resources for drug law enforcement.

Although some costs and benefits may be quantifiable, others are less easily measured but might be no less important.

16.1. Actual costs for police

The actual costs incurred by NSW Police in maintaining and deploying the drug detection dogs has been the subject of much debate. Some sources have estimated the direct costs to be \$90,000 or \$180,000,¹³⁸³ but these figures seem speculative.

In response to a question on notice the (then) Minister for Justice and Minister Assisting the Premier on Citizenship, the Hon. John Hatzistergos MLC, told Parliament in early 2005 that the costs of maintaining a drug detection dog was approximately \$1000 per annum (not including staffing costs).¹³⁸⁴

NSW Police has since advised that the overall cost of the Drug Detection Dog Unit for the 2002-03 financial year was \$868,037.39. As the dogs are also used for activities not related to our review including search warrants authorised under the *Search Warrants Act 1985*, it is not clear what proportion of this total cost can be attributed to general drug detection work.

In any case, this costing seems conservative for a unit with 14 drug detection dogs,¹³⁸⁵ handlers and other costs. By comparison the funding needed for Northern Territory Police to establish a drug detection dog unit with two dogs and two staff was \$600,000 in the first year, and \$268,000 per annum thereafter.¹³⁸⁶

In responding to a request for details of the training and maintenance costs associated with the drug detection dogs, NSW Police provided the following information:

Table 27. Drug Detection Dog-related Costs

Item	NSW Police advice
Purchase a detector dog	\$0 – \$2000
Feed a detector dog	\$2 per day \$730 per annum
Veterinary care per dog	\$4 per day \$1,460 per annum
Trainer Level 1 Sergeant	\$67,047 per annum
Handler	\$66,186 per annum
Kennel Assistant	\$38,895 per annum
Training Cans	\$5,000 per annum
Distracter material	\$3 per dog per day
Kennelling*	\$2401 each dog
Dog leads and collars	\$60 per dog per annum
Vehicles**	\$360.72 per week

* Includes kennel, slab, bed, bowls, delivery and erection costs.

** Based on Rodeo & Falcon Ute, lease registration, servicing, fit & strip, tyres & fuel.

Source: Correspondence from NSW Police, 10 June 2005.

It is useful to consider this information in terms of one-off costs, ongoing costs for the drug detection dogs and costs shared across all dog units, not just the drug dog unit.

16.1.1. One-off costs

Based on the information provided by NSW Police, the estimated one-off costs associated with purchasing 14 drug detection dogs and providing kennel facilities is \$33,614 to \$61,614 – or \$2401 to \$4,401 per dog, depending on the cost of each dog.

16.1.2. Ongoing costs

NSW Police advised that a handler's wage is \$66,186 per annum, not including overtime expenses or other allowances that may apply from time to time. As each dog requires a handler, the total wages should be \$926,604.

Other ongoing costs directly related to the upkeep of the drug detection dogs include food (\$10,220 for the 14 dogs), veterinary care (\$20,440), and dog leads and collars (\$840). The annual cost of training materials (distracter materials and training cans) is \$20,330.¹³⁸⁷

With respect to vehicle-related costs, it is important to note that the dogs require special vehicles to be transported to and from operations. The weekly vehicle-related cost is \$360.72 for each dog and handler, which results in an annual cost of \$262,604.

16.1.3. Shared costs

Shared costs for the Dog Unit include the wages for a trainer and a kennel assistant, which come to a total of \$105,942 per annum. Administrative and other costs such as unit accommodation would also be shared, but these were not included in the information provided.

16.1.4. Other costs associated with deployment

These estimates do not include the costs associated with deploying local officers to support the drug detection dog and handler in drug detection operations. Operations range in size from around six local officers to much larger deployments.

Deploying large numbers of officers from a single command at one time can present difficulties for the command in rostering police for other duties at other times. On the other hand, very large deployments are often facilitated through the centralised Vikings Unit and use officers from a number of commands, limiting the staffing impact on individual commands.

Nor do the estimates quantify the costs involved in prosecuting matters at court, notably the time needed for police prosecutors and other police informants to prepare and present briefs of evidence, attend court and so on.

Apart from any overtime payments or other allowances, none of these costs are additional as NSW Police already employs these staff. On the other hand, there is an opportunity cost. That is, these officers would be working on other matters if they were not performing drug detection dog duties.

16.2. Police and other community views about cost effectiveness

In our discussion paper we invited comment about the costs and benefits of the use of drug detection dogs for general drug detection. Many submissions commented on this issue. Few stated that the benefits justified the costs involved, although many submissions from local and regional police commands were generally positive about the use of the dogs.

The NSW Police response to this issue pointed to a number of benefits of using the drug detection dogs, arguing:

*The benefits of HVP [High Visibility Policing] operations for example, which include the use of drug dogs, in enhancing public amenity, reducing fear of crime and deterring drug supply and other crimes cannot be underestimated.*¹³⁸⁸

Unfortunately the extent of many of these perceived benefits cannot currently be estimated at all. We invited NSW Police to provide evidence to support its position that crime decreases in the vicinity of HVP operations using drug detection dogs. We also asked whether there was any evidence to show that the use of the drug detection dogs themselves (as opposed to police officer deployment) contributed to any reduced crime. NSW Police advised that it did not have any crime figures to support this claim. NSW Police also advised that it was not possible to differentiate the impact of the drug detection dog from general police operations.¹³⁸⁹

NSW Police also asserted that drug detection dog detections increased intelligence holdings and assisted police to better target operations. When asked if such intelligence had led to supply-related arrests, NSW Police was unable to provide any evidence to support this.

A number of submissions from local police noted some additional benefits of using the dogs, for example, in determining whether police have a reasonable suspicion to search a person,¹³⁹⁰ and disrupting the ability of drug suppliers to transport drugs via public transport.¹³⁹¹

The Police Association of NSW submitted that the benefits of using the drug detection dogs were numerous:

*This includes reducing the amount of drugs 'on the streets', more drug dealers being caught, reduction in supply and demand, reduction in a vast array of other offences in the area in which dogs are utilised and the perception of fear of crime is reduced. Therefore any costs associated with their deployment are minor compared to the benefits received.*¹³⁹²

Northern Sydney Health submitted:

*It could be argued that the general mood of the majority of the public would indicate that they require the Government and its Police Service to be taking an active role through initiatives such as the introduction of the 'sniffer' dogs to help reduce and combat the impact illegal drugs are having on the community and people of NSW.*¹³⁹³

However, most submissions argued that the costs of using sniffer dogs for general drug detection outweighed the benefits.

Marrickville Council weighed up the costs and benefits of the drug detection dogs as follows:

Council notes that detection by these dogs is low and conviction extremely low and is achieved at a high price of invasion of personal liberties; and

*Council acknowledges the need to use dogs in a targeted manner when police intelligence supports such an operation.*¹³⁹⁴

The NSW Council for Civil Liberties submitted that the high rate at which the drug detection dogs found no drugs demonstrated that the dogs were neither efficient nor effective.¹³⁹⁵ Ms Clover Moore MP made a similar point in her submission.

The Hon. Amanda Fazio MLC submitted:

*the use of drug detection dogs at major railway stations, subjecting commuters to the humiliation of being "sniffed out" in public is unsustainable based on the levels of detection reported. In any case, it is rare if non-existent for drug traffickers to transport their drugs by train on the Sydney suburban network. At best only a few commuters caught with small amounts of drugs for personal use are only cautioned so the resources of police are being wasted in these circumstances.*¹³⁹⁶

One dance party operator argued that the use of the drug detection dogs at dance parties diverted 'scarce resources from basic policing that deters street crime and ensures community safety.'¹³⁹⁷

Reverend Ray Richmond, Minister for the Wayside Chapel in Kings Cross has also reportedly questioned the cost effectiveness of the drug detection dogs:

*I have come to the opinion that the use of large teams of police and sniffer dogs is an inappropriate use of scarce policing resources, and I would require compelling and sustained evidence to believe the methods are effective.*¹³⁹⁸

Tony Trimmingham of Family Drug Support, described the police use of drug detection dogs as wasteful:

*This strategy is ineffective, costly and a waste of public money and a waste of valuable police resources. Any objective person would view the results as good reason to abandon the strategy. It does nothing to allay the problem of drug users and their families – indeed it can only exacerbate the problems for people affected. It damages the principles of harm minimisation and probably increases fear and prejudice in the community.*¹³⁹⁹

Redfern Legal Centre argued strongly that the costs of using drug detection dogs did not justify any benefits:

*We submit that the costs far outweigh any purported benefits. Our fundamental argument is that the significant police funds and resources that are being put into the invasive and civil rights threatening practice of using drug detection dogs to detect ... small quantities of illicit substances ... on people in public places should be re-allocated into operations which focus on the real criminals and public menaces in the drug trade – namely dealers, traffickers, suppliers, manufacturers and importers. Targeting people in possession of cannabis for personal use while they go about their daily business is a waste of valuable police resources ...*¹⁴⁰⁰

Fairfield City Council expressed concern at 'the potential imbalance for resource allocation between controlling 'hard drugs' and other forms of drugs'. It noted that the most commonly found drug was cannabis and that amounts were usually small:

*It is considered that scarce resources should be allocated to eliminating those drugs that cause greatest harm for our community. This would include heroin and other similar drugs.*¹⁴⁰¹

Legal Aid NSW warned that:

*any erosion of individual's civil liberties must be carefully weighed against the need for effective policing in reducing crime. For the sniffer dog program to continue, research would need to show that it has led to a significant reduction in crime in NSW. There is no indication that this has occurred. In the view of Legal Aid NSW, the evidence suggests that the relative lack of success of the program does not justify its continuance.*¹⁴⁰²

The Office of the Director of Public Prosecutions also submitted that police resources were not efficiently allocated in regard to the drug detection dogs:

The question of whether the resources are best utilised in pursuing persons in the possession of small amounts of cannabis by expensive enforcement methods has to be answered in the negative ...

*The low incidence of searches resulting in the detection of drugs does not appear to warrant the negative aspects of the legislation, particularly the privacy concerns, the distress and embarrassment it causes some persons searched, the time and resources consumed by police and members of the public, the animosity that is aroused towards the police and the likely net effect being that the drugs are being traded elsewhere.*¹⁴⁰³

Some police were also uneasy about the expense of drug detection dog operations. One senior police officer questioned the incongruence of significant expenditure to detect mostly minor cannabis offences:

*we're putting a lot of resources into the detection of a fairly minor offence which ... we now issue cautions for. So, we're saying on one hand that this offence is one, in the overall scale of things, [that's] fairly minor which we should be dealing with other than through court prosecution ... and then on the other hand devoting a lot of resources to detecting [cannabis] ...*¹⁴⁰⁴

Ms Clover Moore MP argued that police resources were being misdirected, particularly in her electorate of Bligh:

The Bligh electorate includes known drug hotspots at Kings Cross, Oxford Street and Eveleigh Street, with nearby residential areas seriously affected by assaults, drug dealing, malicious damage, robberies, street violence and anti-social behaviour. However, police tell me that most of this crime is associated with licensed premises, and with alcohol use and abuse. The 2003 NSW Alcohol Summit identified that 75% of street incidents attended by police in six eastern suburbs Police Commands involved alcohol, and 60% of these occur around licensed premises in Oxford Street.

Sniffer dogs do not address these concerns, do not stop alcohol problems, and do not prevent robberies or assaults.

*Residents who contact my office concerned about crime and safety want police attention and resources focussed on crime where they suffer personal loss and injury ...*¹⁴⁰⁵

Ms Lee Rhiannon MLC was also 'concerned that sniffer dogs roaming the streets do nothing to prevent serious crime and thus represent a misallocation of police resources'.¹⁴⁰⁶

A submission from a drug treatment doctor also argued that the drug detection dogs were not cost effective:

*the principle of using sniffer dogs on members of the public must only be done if there is strong proof that the intrusion is balanced by a community gain. No such evidence exists at this stage to my knowledge.*¹⁴⁰⁷

The UTS Community Law Centre also expressed concern that the drug detection dog program represented a waste of police resources:

*In police sniffer dog operations the dog handlers are accompanied by dozens of officers ... At a raid on the Exchange Hotel around 500 people were detained for an extended period with half of Oxford Street blocked. The nine arrests for possession of small quantities of drugs that resulted do not justify the expenses incurred. We submit that resources expended in drug dog detection are squandered apprehending small-time drug users, people with addictions and very occasionally a small time dealer.*¹⁴⁰⁸

The Hepatitis C Council of NSW also stressed its view that expenditure on drug detection dogs is misdirected:

*We consider that the Police Powers (Drug Detection Dogs) Act does not provide an effective use of public resources as it is our opinion that they do not effectively target or have any substantial impact on drug supply nor break the chain on illicit drug supply. It is an exceptionally costly system to administer and it is our opinion from reading the discussion paper and from liaison within our networks that resources could be far better utilised if they were applied to education concerning drugs and safer drug use.*¹⁴⁰⁹

A number of other submissions expressed the view that costs of the program outweighed any benefits to the community.¹⁴¹⁰

16.3. Weighing up the costs and benefits

As discussed in Chapter 15 'Harm minimisation' the harms of illicit drug use to the community are numerous and are often immeasurable in financial terms. The financial costs to Government of expenditure to combat illicit drug use is also difficult to estimate. More than 10 years ago research estimated the costs of Australia's drug law enforcement to be \$320 million.¹⁴¹¹ Today's costs would be significantly greater.

While there may be some truth in the notion that, as NSW Police have stated, 'every drug detection, no matter how small, benefits the community by taking illegal drugs out of circulation'¹⁴¹² limited resources necessitate that funding be directed to programs which are efficient and effective at achieving their goals.

It is clearly also important that funds are allocated in a manner most likely to minimise the harm that drugs can cause. Law enforcement programs need to be both efficient at meeting their law enforcement goals and thoughtfully implemented so that they do not simultaneously impede health related objectives.

If, as was stated in NSW Parliament, the central goal of the Drug Dogs Act was to make an impact on drug supply in NSW then there is little in this report that shows that the implementation of the legislation has met its objectives. We have discussed at length elsewhere in this report that few detections of drug supply have resulted from the use of the drug detection dogs in general drug detection. As we demonstrated in Chapter 13 'Targeting drug supply', even where charges of supply were preferred by police these were often withdrawn and/or involved small drug amounts, young offenders, and people with no previous criminal history. While we received some anecdotal information that street drug dealers left an area when the drug detection dogs arrived, we found no evidence of any lasting impact of the patrols. Evidence to support claims that intelligence gained during drug detection dog patrols led to the apprehension of drug suppliers was similarly elusive.

The data we 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. An increased policing focus on the detection of cannabis possession offences would seem an unlikely objective given that cannabis arrests already account for almost three quarters of all reported drug offences nationally and 80% of these arrests are for possession and use offences.¹⁴¹³ In addition, as noted in an article by Dr Alex Wodak, Director of the St Vincent's Hospital Alcohol and Drug Service:

*Even law enforcement authorities have noted that '[cannabis offences] ... absorbed a significant proportion of resources dedicated to drug law enforcement. In addition, compared with most other illicit drug use, cannabis use appears to be associated with a comparatively low rate of crime and harm to other individuals in the community....'*¹⁴¹⁴

More peripheral 'benefits' of the use of the drug detection dogs for general drug detection have also been suggested, such as general reductions in crime where the dogs are used, reductions in fear of crime, and disruption of drug markets. However, evidence supporting the existence or measuring the extent of such benefits seems to be limited to anecdotal reports.

In terms of reducing fear of crime we found some support in the research literature that police presence could provide public assurance. However, the research pointed to the importance of the quality of the contact between police and the community and generally referred to small foot patrols rather than the often large-scale operations conducted with the drug detection dogs. Our own small research project into public perceptions of the dogs found that roughly equal proportions of those surveyed felt the police presence either made no difference to their feelings of safety or increased their feelings of safety. A small group felt less safe when they saw the police. In any event, it seems unlikely that the addition of a drug detection dog and handler to police patrols would contribute significantly to any enhancement of community reassurance.

In addition, we have noted a significant level of concern amongst some organisations and members of the community about the intrusive and public nature of police searches which result from the use of drug detection dogs. Our own observations of these searches show that while police may attempt to afford privacy to individuals this is rarely able to be provided. These concerns take on particular significance when viewed in the light of comments in the National Action Plan on Illicit Drugs:

*Deterrence approaches seem to work best when they are low key and respect human rights.*¹⁴¹⁵

In Chapter 15 'Harm minimisation' we discussed at length the harms that the use of drug detection dogs might be encouraging, albeit unintentionally. Numerous sources stated that attempts to avoid being caught carrying drugs had led some drug users to adopt risky practices such as consuming all their drugs at once, driving to venues having consumed drugs at home, purchasing drugs 'on-site' rather than from known suppliers to avoid carrying drugs for any length of time, and changing drug type to potentially more harmful drugs in the belief that the drug detection dogs are less effective at detecting drugs such as GHB.

In addition, while drug detection dogs have detected few people in possession of heroin, the use of the dogs in the vicinity of needle and syringe exchanges, the Medically Supervised Injecting Centre and methadone clinics may be deterring usage of these health related facilities. The public searching of persons lawfully carrying prescription drugs is also of concern. While we have not seen many documented cases of such incidents, the confiscation of prescription drugs by police could lead to extremely serious health consequences for individuals reliant on such medication.

We have also noted the commitment to drug diversion programs and other harm reduction initiatives in which police play an important or leading role. Unfortunately, other than the cannabis cautioning scheme, the majority of persons detected carrying drugs as a result of drug detection dogs receive no benefit from these programs. This seems to be a result of the focus on drug users with significant dependency and/or crime problems in most programs. Drug users who see their use as unproblematic and who are not supporting their use through illegal activities seem to have little in the way of treatment, assessment or education options directed their way. Most who are caught by police will go to court and receive a fine or will have no conviction recorded, with no attention paid to the possible risks involved in their current or future drug use.

Overall our discussion of harm minimisation points to the need to appropriately balance the elements of supply, demand and harm reduction in terms of resourcing and to better ensure that gains in one area are not obtained to the detriment of other key objectives.

Endnotes

- ¹³⁸³ UTS Community Legal Centre submission, 23 August 2004; www.lee.greens.org.au/speeches; P. Durham, 'Gone to the Dogs', *North Shore Times*, 21 July 2004.
- ¹³⁸⁴ NSWPD, Questions and Answers No. 89, Legislative Council, 22 February 2005.
- ¹³⁸⁵ As at 10 June 2005.
- ¹³⁸⁶ O'Sullivan J & Foster P, *2003 Independent Assessment of Police Resources – Final Report*, Northern Territory Government, (2003). According to the *Northern Territory News*, 21 June 2004, the NT Government subsequently agreed to fully fund this initiative.
- ¹³⁸⁷ This assumes the \$5,000 per annum budgeted for 'training cans' is for all the dogs, and not per dog.
- ¹³⁸⁸ Ministry for Police submission, 30 August 2004.
- ¹³⁸⁹ Ministry for Police submission, 30 August 2004.
- ¹³⁹⁰ Western Region of NSW Police submission, 4 August 2004.
- ¹³⁹¹ Crime Manager (endorsed by Commander), Western Sydney Command submission, 31 July 2004.
- ¹³⁹² Police Association of New South Wales submission, 19 August 2004.
- ¹³⁹³ Northern Sydney Health submission, 14 July 2004.
- ¹³⁹⁴ Candy Nay, General Manager, Marrickville Council submission, 28 July 2004.
- ¹³⁹⁵ NSW Council for Civil Liberties submission, 19 August 2004.
- ¹³⁹⁶ The Hon. Amanda Fazio MLC submission, 9 August 2004.
- ¹³⁹⁷ Transmission Promotions Pty Ltd submission, 4 August 2004.
- ¹³⁹⁸ Correspondence from Ms Clover Moore MP, Member for Bligh, 4 December 2002.
- ¹³⁹⁹ Tony Trimmingham, Family Drug Support submission, 6 August 2004.
- ¹⁴⁰⁰ Redfern Legal Centre submission, 20 August 2004.
- ¹⁴⁰¹ Fairfield City Council submission, 25 August 2004.
- ¹⁴⁰² Legal Aid NSW submission, 23 August 2004.
- ¹⁴⁰³ Office of the Director of Public Prosecutions submission, 4 August 2004.
- ¹⁴⁰⁴ Interview with senior police officer, March 2004.
- ¹⁴⁰⁵ Ms Clover Moore MP submission, 9 August 2004.
- ¹⁴⁰⁶ Ms Lee Rhiannon MLC submission, 9 August 2004.
- ¹⁴⁰⁷ Dr Andrew Byrne submission, 2 August 2004.
- ¹⁴⁰⁸ UTS Community Law Centre submission, 19 August 2004.
- ¹⁴⁰⁹ Hepatitis C Council of NSW submission, 12 August 2004.
- ¹⁴¹⁰ For example: J. Ready submission, 22 July 2004; Nimbin Hemp Embassy submission, 9 August 2004, The Youth Justice Coalition submission, 20 August 2004; Marrickville Legal Centre submission, 20 August 2004; and The Shopfront Youth Legal Centre submission, 9 August 2004.
- ¹⁴¹¹ Cited in Weatherburn D, 'Performance Indicators for Drug Law Enforcement', *Contemporary Issues in Criminal Justice*, No. 48, NSW Bureau of Crime Statistics and Research, Sydney, February 2000.
- ¹⁴¹² Ministry for Police submission, 30 August 2004.
- ¹⁴¹³ Australian Crime Commission (ACC), *Illicit Drug Data Report 2003-04*, ACC, Canberra, 2005.
- ¹⁴¹⁴ Wodak A & Cooney A, 'Should cannabis be taxed and regulated?', *Drug and Alcohol Review*, June 2004, p.139.
- ¹⁴¹⁵ Ministerial Council on Drug Strategy, *National Action Plan on Illicit Drugs 2001 – 2002*, Commonwealth Department of Health and Aged Care, Canberra, (2001), p.23.

Chapter 17. Conclusion

It would be difficult to conclude with any certainty that the current use of drug detection dogs in general drug detection represents a cost effective use of police resources.

It is clear this approach does little to enhance the police capacity to effectively target drug suppliers. Nor is there strong evidence to support other perceived benefits such as deterrence, reduction in drug use, decreases in drug-related crime, or enhanced perceptions of safety. These benefits, although possible, cannot be relied on to support the use of the drug detection dogs.

It is relevant to note, as the Hon. John Della Bosca MLC, Special Minister of State, has submitted, that:

*the use of drug detection dogs is just one part of the State's multi-faceted approach aimed at reducing illicit drug supply and use. This should be borne in mind when evaluating the effectiveness of the drug dogs to reduce and deter illicit drug abuse and supply.*¹⁴¹⁶

In this light, it is important to consider whether implementing the Drug Dogs Act has significantly contributed to the state's overall drug law enforcement strategies and whether it sits comfortably within the overriding harm minimisation approach adopted by all Commonwealth, State and Territory governments.

Possession of illicit drugs, including cannabis, is a criminal offence in NSW and it is the responsibility of NSW Police to enforce drug laws. However, within this broad responsibility exists much choice as to methods of enforcement, targeting of offences and drug types, and levels of cooperation with community and government sectors – importantly the health sector.

The Drug Dogs Act enables police to use the drug detection dogs in prescribed public places under certain conditions. The Drug Dogs Act does not, however, dictate the frequency of the use of the dogs, the size of accompanying police deployments, the number of drug detection dogs available for use in public places, the choice of specific locations, the choice of drug scents on which the dogs are trained, or the nature or outcomes of police contact with drug offenders.

NSW Police have been using drug detection dogs for over five years. However, there is no evidence that NSW Police has undertaken a systematic assessment of the use of drug detection dogs to examine the most effective arrangements for their deployment. This suggests that NSW Police has yet to evaluate whether using drug detection dogs is a cost effective drug law enforcement strategy or a cost effective use of police resources overall.

This office, after reviewing the available evidence, has made many recommendations which may increase the effectiveness of the use of drug detection dogs and encourage a better fit with drug harm minimisation objectives. The implementation of these recommendations may go some way to improving the law enforcement and harm minimisation outcomes achieved through the use of the drug detection dogs.

However, it seems unlikely that these kinds of changes will be sufficient to transform the use of the dogs in general drug detection to such an extent that they are a cost effective tool to target drug supply.

17.1 Recommendations

Given our misgivings about whether the Drug Dogs Act will ever equip police with a fair, efficacious and cost effective law enforcement tool to target drug supply, we suggest that the starting point when considering our report is a review of whether in fact the legislation in its present form, or amended as suggested, should be retained at all.

Recommendation

54. NSW Parliament consider whether the Drug Dogs Act in its present form, or with recommended amendments, should be retained at all.

In any event, there are very real uncertainties about whether the significant number of recommended amendments to the legislation and police practice will result in the legislation achieving its purpose. We have recommended (at paragraph 10.4.5) that NSW Police publicly report the results of operations where drug detection dogs have been used. In addition, it is our view that if the legislation is to be retained, further monitoring of its use will be necessary to determine whether the legislation is better able to achieve its objective with the recommended changes.

Recommendation

55. NSW Parliament consider providing for a further period of monitoring of the use of drug detection dogs similar to that contained in section 13 of the Drug Dogs Act.

NSW Police offered the following comments in response to recommendation 54:

NSW Police believes the [Drug Dogs] Act should be retained and that the use of drug detection dogs in accordance with the [Drug Dogs] Act is an effective tool for policing low level drug crime. While it is indisputable that the drug dog operations detect a very small number of supply offences, the demonstrable impact of these operations on drug user behaviour (as documented in chapter 15) suggests that it is also likely that the use of the [Drug Dogs] Act acts as a deterrent to both street level drug supply and use. However, this impact is not easily quantified. Arguably, by disrupting these markets in this way, the drug dogs contribute to reducing the supply, demand and harms associated with illicit drugs.

NSW Police would welcome any consideration Parliament would give to strengthening the [Drug Dogs] Act, and has supported the majority of the legislative amendments recommended by the Ombudsman.¹⁴¹⁷

The NSW Police comments are tacit acceptance that the Drug Dogs Act is not achieving its primary objective of targeting drug supply. NSW Police refer to the 'demonstrable impact' on the behaviour of drug users outlined in Chapter 15 of this report. Chapter 15 details many of the potentially negative or adverse impacts on drug users that are a result of drug detection dog operations, and suggests that these impacts may be at odds with harm minimisation principles. The chapter does not provide support for the contention that the use of drug detection dogs has substantially disrupted street level drug trade. Indeed, there is only scant anecdotal evidence to support this contention.

NSW Police did not comment on recommendation 55, noting that it was a matter for Parliament.¹⁴¹⁸

Endnotes

¹⁴¹⁶ The Hon. John Della Bosca MLC submission, 15 September 2004.

¹⁴¹⁷ NSW Police response to draft final report, 10 March 2006.

¹⁴¹⁸ NSW Police response to draft final report, 10 March 2006.

Appendix A List of submissions

AIDS Council of NSW (ACON)

Associate Professor Michael Dawson, Head, Department of Chemistry, Materials and Forensic Science, University of Technology, Sydney (UTS)

Attorney General's Department of NSW

Bradfield College students (Aine Duffy, James Healey, Stephen Law, Alex Turner, Emma McGarrity, Emily Luke, Melissa Logan, Judie Suttor (Class Teacher))

Brian Perry, Managing Director, Perry Hotels

Centre for Drug and Alcohol, NSW Health Department

ClubsNSW

CM, private individual

Community Relations Commission

Department of Juvenile Justice

Dr Andrew Byrne

Fairfield City Council

Glenn Lockitch

Hepatitis C Council of NSW

Illawarra Health

JD, private individual

John Aitkin

John Ready

Justin Chisholm, Commander, Transit Police, Inner Metropolitan Region

Legal Aid NSW

Marrickville Council

Marrickville Legal Centre

Michael Gormly

Ministry for Police

Ms Clover Moore MP

Ms Lee Rhiannon MLC

Nimbin Hemp Embassy

norrie mAy-welby

Northern Sydney Health

NSW Commission for Children and Young People

NSW Council for Civil Liberties (CCL)

NSW Department of Community Services

NSW Department of Education and Training

NSW Police, Lower Hunter Local Area Command
NSW Police, Marrickville Local Area Command
NSW Police, Newcastle Local Area Command
NSW Police, Penrith Local Area Command
NSW Police, Richmond Local Area Command
NSW Police, Waratah Local Area Command
NSW Police, Western Region
NSW Users and AIDS Association (NUAA)
Office of the Director of Public Prosecutions (ODPP)
Police Association of New South Wales
Police Integrity Commission
Privacy NSW
Rail Corporation New South Wales (RailCorp)
Redfern Legal Centre
The Hon. Amanda Fazio MLC
The Hon. John Della Bosca MLC, Special Minister of State
The Hon. Tony Kelly MLC, Minister for Local Government
The Shopfront Youth Legal Centre
The Youth Justice Coalition
Tim Benzie
Tobin Saunders
Tony Trimmingham, Family Drug Support
Transmission Promotions Pty Ltd
UTS Community Law Centre

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