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NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Attention: Emma Koorey

Review of Police Powers (Drug Detection Dogs) Act

Thank you for sending us a copy of your Discussion Paper on the *Review of the Police Powers (Drug Detection Dogs) Act*. We welcome the opportunity to provide a submission to the review of the Act.

We do not propose to address every question raised in the Discussion Paper, but will respond to those questions most relevant to our service and our clients.

The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of Freehills, Mission Australia's Sydney City Mission and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. The Shopfront is located in Darlinghurst and our primary client base is in the inner city area. However, we also act for young people in other parts of metropolitan Sydney and occasionally in regional areas.

Most of the Shopfront's clients are homeless or otherwise seriously disadvantaged. A substantial proportion of our clients are dependent on illicit drugs; many others are occasional or recreational drug users. Several of our clients have been searched, and some have been charged with drug possession offences, following the use of drug detection dogs.

Accuracy of drug detection dogs (Questions 5(a) to (e))

We note from the Discussion Paper that only 27% of drug dog indications have resulted in drugs being found. This is consistent with anecdotal evidence from our clients, many of whom report having being “mistakenly” indicated by sniffer dogs.

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 a “reasonable suspicion”.

One of the leading cases on police search powers is *R v Rondo* [2001] NSWCCA 540. According to Smart AJ (at para 53), “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.”

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.

We do not support the introduction of a direction-giving power to enhance the accuracy of drug detection dogs in crowded areas. We are concerned that directions issued for this purpose (eg “move over there”, “stay here for a moment”) may effectively involve detaining people, which is prohibited by section 10 of the Act. Section 10 is a very important safeguard that should not be removed or diluted in any way.

Records of the searching of persons following drug dog indications (Questions 6(c), (d) and (e))

We are very concerned about the collection of “intelligence” on individuals who are searched with a negative result. By the time a person has been “indicated” by a drug detection dog, and then searched by police, their privacy has already been interfered with to some extent. In cases where no drugs or other illegal items are found, it is difficult to see a justification for further interfering with a person’s privacy by recording personal details and entering them into police record-keeping systems.

The Shopfront has worked with a number of young people who have been repeatedly stopped, searched and questioned (some would say harassed) due to the existence of intelligence reports on the COPS system. In our experience these intelligence reports often have little substance and may even be based on inaccurate information. In particular, people with “drug-related intel” seem to be singled out for police attention. One of our clients, a young man in his early 20s, recently reported that his car was repeatedly being pulled over and searched by police for no apparent reason. A Freedom of Information application revealed that police held “drug-related intelligence” on our client (albeit not from a dog indication). In our view, the intelligence was fairly vague and would not have been sufficient to found a reasonable suspicion that our client was in possession of drugs or involved in criminal activity.

We acknowledge that the collection and maintenance of intelligence reports can be a useful policing tool. However, we believe a balance needs to be struck between effective policing and personal privacy. We suggest that the maintenance

of intelligence reports on persons found not to be in possession of drugs tips the balance unreasonably in favour of the former.

Discrimination and targeting issues (Questions 6(f), (g) and 11(i))

We of course we acknowledge that drug detection dogs themselves do not discriminate – they indicate a person based on a scent, and not the person’s age or appearance. However, the places in which dogs are used may amount to indirect discrimination.

We are of the view that the use of drug detection dogs on public transport routes, particularly railways, discriminates against young people and low income earners, who usually have no option but to use public transport.

We also believe that the use of dogs in certain areas and venues creates a legitimate perception that particular communities are being targeted (for example, the gay community in Darlinghurst).

Harm minimisation (Questions 7(a) to (c))

We are concerned that the use of drug detection dogs may have an adverse impact on harm minimisation policies. We believe this is an area which warrants further scrutiny.

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 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.

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. We are also aware of instances when people have discarded their drugs on the streets (this sometimes provides a “windfall” to another drug user who later finds the drugs).

The use of drug detection dogs may also discourage people from disposing of used needles appropriately. As mentioned in the Discussion Paper, a dog may be able to detect a residual scent of drugs 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.

Drug diversion programs (Questions 7(d) and (e))

Although it is true that many people found in possession of drugs after the use of sniffer dogs have been cautioned under the Cannabis Cautioning Scheme, many people have been prosecuted, at considerable cost and with little discernible public benefit.

We support the Cannabis Cautioning Scheme and applaud the fact that police appear to be using it in most cases where the eligibility criteria are met. However, we are of the view that the eligibility criteria are unduly restrictive and should be expanded. For example, we believe that one or two previous convictions for summary drug offences (eg. possession, self administration, being on drug premises) ought not to preclude a person from receiving a caution. We also believe that cautioning should be available for individuals in possession of other types of drugs.

We also believe that consideration should be given to expanding the Criminal Infringement Notices Trial 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.

Targeting drug supply (Questions 9(b) to (e))

The evidence presented in the Discussion Paper (together with anecdotal evidence from other organisations and from our individual clients) shows that the vast majority of people found in possession of drugs after detection by a dog have small quantities, most likely for their personal use. Cannabis (generally regarded by the legislature and the general community as a “softer” drug than others) was by far the most common drug found.

Contrary to the stated aim of the legislation, the dogs do not seem to be detecting and catching drug suppliers.

We acknowledge 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. However, without further research on this issue it is impossible to state with certainty whether the legislation is having this effect.

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 to bring the customer back to private premises to supply the drugs. Anecdotal evidence suggests that the practice of supplying from cars has also increased.

Even if the use of sniffer dogs does catch or disrupt dealers, they are more likely to be the unsophisticated-low level dealers - not the “drug lords” that the former Police Minister, Mr Costa, hoped to target.

Some people found in possession of drugs may be charged with “deemed supply”, even though the drug is for their own personal use. This 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 may quite easily consume during a weekend) would be deemed to be in possession for the purpose of supply.

In our view, the use of drug detection dogs to detect and prosecute personal possession offences is a colossal waste of police resources. Although possession and self-administration of prohibited drugs remain offences under the *Drug Misuse & Trafficking Act*, they are summary offences only. It is a widely-held view (especially since the NSW Parliamentary Drug Summit in 1999) that there is little public interest in prosecuting users, whether they be recreational users or people who are dependent on illicit drugs.

Reducing fear of crime in the community (Question 9(f))

We acknowledge that the use of drug detection dogs (like any high-visibility policing strategy) may help reduce the fear of crime among some sections of the community.

However, we believe that fear of crime is often misplaced, and is perpetuated by irresponsible media reporting and political campaigning. In our view, fear of crime would be better addressed by adopting genuine crime prevention measures and by educating the public about the myths and realities of crime.

Legal interpretation issues: persons seeking to enter or leave premises (Question 10(a))

We agree that section 7 of the Act 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 the 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.

Reasonable suspicion created by “avoidance” of drug detection dogs (Question 10(g))

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 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.

In the case of *Streat v Bauer; Streat v Blanco* (unreported, SCNSW, 16 March 1998, BC9802155) the Supreme Court discussed the concept of reasonable suspicion in relation to police searches. In that case it was held that the defendants’ unwillingness to be searched did not give police a reasonable suspicion so as to justify searching them. This authority has been followed in subsequent decisions (including *R v Rondo*, cited above) concerning the nature of reasonable suspicion.

Conclusion

We acknowledge that the use of drug detection dogs may be an appropriate policing strategy in some situations (for example, at airports to assist in the detection of drug importation).

However, we believe that the widespread use of dogs for general drug detection pursuant to the *Police Powers (Drug Detection Dogs) Act* is undesirable, for the following reasons:

- it targets and catches the wrong people (drug users and the occasional low-level dealer, instead of the higher-level suppliers);
- it consumes significant police resources which could be more effectively spent elsewhere;
- it is an unreasonable incursion on the civil liberties of citizens (especially given the very limited law enforcement benefits that it brings).

Please contact us on 9360 1947 or at jane.sanders@freehills.com if you wish to discuss any aspect of this submission.

Yours faithfully

Jane Sanders
Solicitor