



NSW Ombudsman

Review of the *Police Powers
(Drug Detection Trial) Act 2003*

June 2008



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(*Drug Detection Trial*) Act 2003

June 2008

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*Review of the Police Powers
(Drug Detection Trial) Act 2003*

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ISBN 978-1-921132-16-2

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NSW Ombudsman

2 June 2008

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The Honourable John Hatzistergos MLC
Attorney General
Level 33, Governor Macquarie Tower
1 Farrar Place
Sydney NSW 2000

Dear Attorney

Pursuant to section 22 of the *Police Powers (Drug Detection Trial) Act 2003*, I have been required to keep under scrutiny the exercise of functions conferred on police by the Act.

I am pleased to provide you with my report detailing the activities undertaken, and my findings and recommendations that result from this review.

I draw your attention to section 22(5) of the Act, which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable after receipt.

Yours sincerely

Bruce Barbour
Ombudsman



NSW Ombudsman

2 June 2008

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The Honourable David Campbell MP
Minister for Police
Level 35, Governor Macquarie Tower
1 Farrar Place
Sydney NSW 2000

Dear Minister

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Yours sincerely

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Mr Andrew Scipione
Commissioner of Police
Level 14, 201 Elizabeth Street
Sydney NSW 2000

Dear Commissioner

Pursuant to section 22 of the *Police Powers (Drug Detection Trial) Act 2003*, I have been required to keep under scrutiny the exercise of functions conferred on police by the Act.

I am pleased to provide you with my report detailing the activities undertaken, and my findings and recommendations that result from this review.

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Yours sincerely

Bruce Barbour
Ombudsman

Foreword

The vehicular trafficking of large quantities of drugs is a significant law enforcement issue. With increased security at domestic airports in response to the threat of terrorism, it would appear that the road-based movement of drugs is now a more appealing option to drug couriers.

Without doubt, police need a variety of strategies to detect generally well-organised drug couriers. The *Police Powers (Drug Detection Trial) Act 2003* aimed to equip police with additional powers to tackle the vehicular trafficking of indictable quantities of drugs by allowing police to randomly stop and screen vehicles with drug detection dogs in areas where there is intelligence and evidence suggesting that drugs are being couriered on a regular basis.

A critical examination of this trial and its predecessor — the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* — reveals the powers are demonstrably ineffectual in assisting police to apprehend drug couriers on a sustained basis. The inability to conduct operations with a sufficient element of surprise due to the rapid dissemination of the nature and location of operations via CB radio and mobile phone networks, as well as the limited capacity of drug detection dogs to detect the scent of drugs secreted in heavy vehicles, are inherent flaws for which there is no simple remedy.

Police already have a number of tried and proven strategies to identify and apprehend drug couriers. Highway patrol officers regularly apprehend drug couriers with significant amounts of drugs as a result of using their intuition, knowledge and experience while conducting ordinary duties. I am confident that the cessation of the trial powers will not impact on the capacity of police to seize drugs being trafficked by road throughout NSW.

I trust this report will assist both police and the Parliament in assessing the effectiveness of strategies to tackle the vehicular trafficking of prohibited drugs.



Bruce Barbour
Ombudsman

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Executive summary

Background to this report

On the 23 February 2007, the *Police Powers (Drug Detection Trial) Act 2003* ('the Drug Detection Trial Act') revived, with amendments, the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Border Areas Trial Act').

Border Areas Trial Act

The Border Areas Trial Act established an 18-month trial (from 15 January 2004 to 15 July 2005) giving police the power to set up roadside check points to stop and screen vehicles with drug detection dogs. The border areas trial was specifically aimed at detecting persons involved in the vehicular trafficking of indictable quantities of prohibited drugs in 'border areas' in southern and western New South Wales.

The Ombudsman reviewed the first nine months of the border areas trial and found that despite the professional and diligent efforts of police, the objective of the trial was not realised. Police conducted nine operations which yielded two large seizures of indictable quantities of prohibited drugs but neither seizure resulted in a successful supply prosecution.

We noted that police efforts during the trial were hampered by some of the legislative requirements. We made a number of recommendations aimed at improving police practice and procedure should the Parliament consider extending the trial. However, the results and the costs of the trial led us to question whether the continued allocation of resources to the trial was in the public interest. We also noted that there might be more effective strategies to target vehicles carrying significant quantities of drugs.

Accordingly, we recommended that Parliament consider allowing the Border Areas Trial Act to expire pursuant to the sunset clause. The Border Areas Trial Act expired on 15 July 2005. Police did not conduct any further operations after the delivery of our final report to the Attorney General, Minister for Police, and the Commissioner of Police on 10 January 2005. The Attorney General tabled the report in Parliament on 25 October 2006.

Drug Detection Trial Act

The Drug Detection Trial Act established a further 18-month trial of police powers similarly aimed at detecting and/or frustrating persons involved in the vehicular trafficking of indictable quantities of prohibited drugs. The Drug Detection Trial Act contains amendments to the Border Areas Trial Act aimed at increasing the flexibility and mobility of operations, as well as making the operations less predictable and more difficult to evade.

Section 22 of the Drug Detection Trial Act required the Ombudsman to review the first 12 months of the trial (23 February 2007 to 22 February 2008). This report outlines the activities undertaken as part of the review and details our observations, findings and recommendations.

During the review we conducted various research activities including:

- direct observation of police conducting operations
- examination of material used as the basis for conducting operations
- analysis of results of operations including drugs seized, charges laid, and court outcomes
- examination of searches recorded on the police computer system
- consultation with a range of stakeholders including police officers of various ranks
- survey of individuals stopped and searched by police during operations, and
- follow up of recommendations of previous Ombudsman reviews involving the use of drug detection dogs.

Key provisions

The Drug Detection Trial Act allows a police officer to apply for an authorisation to conduct a drug detection operation utilising drug detection dogs to screen the outside of vehicles stopped at a check point or stopped within search areas located in 'outer metropolitan areas' of New South Wales. In addition, police can enter and screen the luggage holds of coaches and the cargo areas of commercial vehicles such as trucks.

A senior police officer of or above the rank of Assistant Commissioner may grant an authorisation to conduct a drug detection operation if satisfied that there are reasonable grounds to suspect that the proposed search area is being,

or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs and that the nature and extent of the proposed operation is appropriate to the suspected criminal activity.

An authorisation may be granted for up to 14 days and contain 3 search areas of up to 5 square kilometres. In addition, police can establish multiple check points in specified search areas and move the check points at any time.

Results of drug detection trial operations

During the one-year review period police conducted a total of 23 drug detection operations utilising a variety of deployment strategies. The operations were conducted over 52 days, involving 624 officers and 48 drug detection dogs, at a total cost in excess of \$300,000. In summary:

- A total of 7,527 vehicles were stopped and screened by drug detection dogs.
- A total of 591 vehicles (8% of all vehicles stopped) and 537 persons were searched.
- Seven indictable quantities of drugs were seized. Six of the seven seizures resulted from searches on three vehicles and/or their occupants. The seventh indictable amount seized was located alongside a garbage bin near a check point.
- The rate of finding indictable quantities of drugs in all vehicles stopped was 0.04% (3 of 7,527).
- One or more drugs were located in 2% (133 of 7,527) of all vehicles stopped.
- The rate of finding indictable quantities of drugs in vehicles where one or more drugs were located was 2.3% (3 of 133).

The rate of finding drugs after an indication by a drug detection dog was 23% (133 of 591).

Drugs seized

No indictable quantities of cannabis were seized. However, indictable quantities of amphetamine (9.0g, 9.5g, 11.0g, and 12.5g), ecstasy (10.7g (40 tablets)), cocaine (6.74g), and nexus (1.39g) were seized.

The most commonly seized drug was cannabis (123 occasions). A total of 1490.39 grams of cannabis was seized, which, if found on a single occasion, would amount to an indictable quantity of cannabis. The median cannabis seizure was 3.0 grams, which is one-tenth of the prescribed small quantity of cannabis (30 grams). Seven cannabis seizures (6%) were greater than the prescribed small quantity (31.9g, 36.0g, 36.0g, 42.0g, 57.0g, 227.8g, and 426.0g). The largest single seizure of cannabis was 426.0 grams.

The next most commonly seized drug was amphetamine (19 occasions). A total of 68.08 grams of amphetamine was seized. The median amphetamine seizure was 1.5 grams. The largest single find of amphetamine was 12.5 grams. Four of the 19 seizures of amphetamine were of an indictable quantity.

A total of 15.5 grams of ecstasy was seized (8 occasions). The median ecstasy seizure was 0.6 grams. The largest single seizure of ecstasy was 10.7 grams (40 tablets), the only indictable quantity detected.

A total of 11.94 grams of cocaine was seized (4 occasions). The median cocaine seizure was 2.1 grams. The largest single seizure of cocaine was 6.74 grams, the only indictable quantity detected.

An indictable quantity of nexus (1.39 grams) was seized on the only occasion the drug was detected.

A number of cannabis smoking implements such as bongs and pipes were also seized.

Legal actions

The most common legal action resulting from drug seizures was the issue of a cannabis caution. A total of 78 persons were issued with a cannabis caution.

A total of 60 persons were charged with drug-related offences including:

- possess prohibited drug (70 charges)
- possession of equipment for administering prohibited drugs (9 charges)
- drive while under influence of drugs (1 charge)
- supply prohibited drug (5 charges)
- supply prohibited drug > small and < = indictable quantity (1 charge), and
- supply prohibited drug > indictable quantity (not cannabis) (5 charges).

In addition, a number of non drug-related charges were laid including 12 for drink driving. Police also issued more than 112 traffic infringement notices.

Court outcomes

At the time of finalising this report:

- Sixty possess prohibited drug charges had been determined at court. Twelve charges were dismissed without proceeding to a conviction. One charge resulted in the person receiving a 12-month section 9 good behaviour bond. The remaining 47 charges resulted in fines ranging from \$75 to \$750 with an average of \$311.
- One possession of equipment for administering prohibited drugs charge was dismissed without proceeding to a conviction and the remaining eight charges resulted in fines ranging from \$80 to \$300 with an average of \$150.
- The one drive while under the influence of drugs charge resulted in a \$600 fine and a six-month disqualification from driving.
- Two supply prohibited drug charges involving 22.3 and 426 grams of cannabis had been determined at court. One resulted in a \$1000 fine and a two-year section 9 bond to be of good behaviour. The other resulted in a \$2000 fine and a six-month suspended gaol sentence. Another supply charge was withdrawn with the person being convicted of possess prohibited drug and receiving a 12-month section 9 bond.
- The one supply prohibited drug > small and < = indictable quantity charge involving 1.0 gram of ecstasy (20 tablets) resulted in a four month gaol term. An appeal on the severity of the sentence has been lodged.
- None of the five supply prohibited drugs > indictable quantity (not cannabis) charges have been determined at court.

Persons found with drugs

Most people detected with prohibited drugs during operations were found in possession of small amounts of cannabis. In addition, the majority of people found with drugs had little or no previous contact with the criminal justice system.

A total of seven persons were charged with supply prohibited drug offences. Four of the seven persons were found with indictable quantities of drugs.

A total of 18 persons were found in possession of amphetamine during the review period. Of these, five were heavy vehicle drivers including one driver with an indictable quantity of 11.0 grams. In addition, a driver of a Pantec truck was charged and convicted with drive under the influence of amphetamine and cannabis.

Similarities and differences between the border areas and drug detection trials

In many respects the two trials yielded similar results. For example, the rate of searching vehicles stopped (8%) and the rate of finding drugs in all vehicles stopped (2%) was the same in both trials. Also, indictable quantities of drugs were located in two separate vehicles during the border areas trial and in three separate vehicles during the drug detection trial.

In addition, the most common legal action in both trials was the issue of a cannabis caution, which demonstrates that police mostly seized small amounts of cannabis during the review periods for both trials.

Interestingly, the total amount of drugs seized during the border areas trial was much higher (4799.81 grams of cannabis and 1025.41 grams of amphetamine) than during the drug detection trial (1490.39 grams of cannabis and 68.08 grams of amphetamine). However, it should be noted that amounts of ecstasy (15.5 grams in total), cocaine (11.94 grams in total) and nexus (1.39 grams in total) were also seized during the drug detection trial.

There were no successful prosecutions for drug supply as a result of the border areas trial. As a result of the drug detection trial, two persons have been successfully prosecuted for supply prohibited drug involving 22.3 grams and 426.0 grams of cannabis respectively. A further four persons are facing a total of seven supply charges with six of the charges involving indictable quantities of drugs (9.5, 11.0 and 12.5 grams of amphetamine; 10.7 grams (40 tablets) of ecstasy; 6.74 grams of cocaine; and 1.39 grams of nexus). At the time of finalising this report, these charges had yet to be determined at court.

Issues identified during the drug detection trial

Examination of process for granting authorisations

Our examination of the 23 authorisations granted revealed that most applications for authorisation contained a wide variety of credible intelligence and evidence of previous seizures to justify the grant of an authorisation by the NSW Police Force designated officer. In addition, there was a high degree of compliance with the legislative requirements for applications and the grant of authorisation. However, we had some concerns about the low level of compliance with the report back requirement given the need for designated officers to be apprised of the results of previous operations when considering the likelihood of success of future operations.

Rate of finding drugs

The rate of finding drugs after an indication by a drug detection dog was 23%. That is, during the review period, police did not locate drugs in over three quarters of the searches of vehicles and/or their occupants after a drug detection dog indication.

The low rate of finding drugs after a drug detection dog indication has the capacity to undermine public confidence in the ability of drug detection dogs to accurately detect the scent of prohibited drugs. It may also call into question the police practice of relying on a drug detection dog indication as one of the factors relevant to the formation of the requisite reasonable suspicion to search a person and/or vehicle.

There are a number of possible reasons why the rate of finding drugs is low including the fact that drug detection dogs appear to indicate the scent of cannabis smoke and prescription drugs. The low rate of finding drugs might also be a result of officers not conducting thorough searches or simply that the dogs sometimes make mistakes.

One suggestion to instil public confidence in the dogs' ability to accurately detect the scent of drugs is to independently validate the training methodology currently utilised at the Dog Unit. That is, determine the accuracy of dogs in a controlled environment in the absence of factors that may be impacting on the rate of finding drugs. In our view, there may be some merit in a validation program but only if issues associated with indications on cannabis smoke, prescription drugs and other residual scents are addressed. We appreciate this may be a complicated task given, for example, the lack of any clear evidence about whether dogs trained to detect the scent of dried, unburnt cannabis also detect the scent of burnt cannabis. However, it is clearly necessary given the unacceptably high proportion of usually very public and potentially embarrassing searches conducted by police that do not result in the seizure of drugs.

Inaccurate records of searches on the police computer system

Our examination of search records revealed that police generally recorded searches appropriately. However, we discovered some examples of inaccurate and potentially misleading recording of searches for one operation. Almost two-thirds (22 of 35) of the search records created by police contained an incident category 'Actual Drug Detection' with a further classification 'Other Drug Detection/Seizure Offence' in circumstances where no drugs were seized and no drug offence detected.

The NSW Police Force has undertaken to review and amend the records given their potential to prejudice a person's future dealings with police and the fact that these records are used to compile statistics on drug detections published in the NSW Police Force Annual Report.

Reasonable suspicion to search a person

The Drug Detection Trial Act did not create any new search powers for police. In order to lawfully search a person and/or vehicle, a police officer must first suspect on reasonable grounds that the person is in possession of, or the vehicle contains a prohibited drug.

During the review we came across examples where police appeared to search persons based on a suspicion that the person was recently in possession of a drug or near people who had been using drugs. In our view, this interpretation of the law is too broad. Arguably what is required is that person is *currently* in possession of a prohibited drug.

We note that the NSW Police Force is in the process of implementing new procedures advising police that a drug detection dog indication on its own does not give a police officer the requisite reasonable suspicion to search a person. We also note that the procedures document for the Drug Detection Trial notes that there must be a factual basis for police to reasonably suspect the *presence* of a prohibited drug on the person or in the vehicle to be searched.

Unavailability of roadside drug testing during operations

Police were instructed not to conduct roadside (oral fluid) drug testing during drug detection operations as a result of an agreement between the Minister for Police and the Minister for Roads. This restriction caused significant disquiet amongst police conducting operations due to the fact that they occasionally had to allow drivers — who appeared drug affected, or who had made admissions of recent drug use — to continue on their journeys.

Police are only able to lawfully arrest and detain a person for the purpose of obtaining blood and urine samples at a hospital where they reasonably believe the driver is under the influence of drugs based on the manner in which the driver drove or attempted to drive a vehicle. This requirement appears to preclude taking into account observations or admissions of drivers stopped at check points during operations. Nevertheless, we noted two occasions where police — motivated by a desire to ensure road safety — arrested drivers and took them to a local hospital for blood and urine testing. The availability of oral fluid testing during operations would have obviated the need to take this arguably unlawful action and would have provided police with an appropriate tool to address their concerns about drug-affected drivers. In our view, the disquiet expressed by police appears to be well founded.

Effectiveness of drug detection operations

The results of operations conducted during the drug detection trial clearly demonstrate that the objectives of the trial have not been realised. There appears to be little or no evidence suggesting that drug detection trial operations are useful in apprehending or frustrating persons involved in the vehicular trafficking and/or supply of indictable quantities of prohibited drugs.

Overwhelmingly, drug detection trial operations resulted in the detection of persons involved in 'minor possession' offences rather than those involved in the supply or trafficking of indictable quantities of drugs.

Impact of the legislative changes

The Drug Detection Trial Act contained a number of changes aimed at increasing the flexibility and mobility of operations, and to make operations less predictable and more difficult to evade. The changes included a shift from warrants granted by judges authorising the police use of the powers, to authorisations granted by senior police; a simplification of the application process although not of the material required to justify the basis of an operation; an extension of the geographical areas where operations could be conducted (from 'border areas' in southern and western NSW to all 'outer metropolitan areas' of NSW); an increase in the number of check points permitted (from one to any number), the size of search areas (from 1km² to 5km²), and the duration for which an authorisation was in force (from 72 hours to 14 days); and the removal of signage requirements at check points.

There is little evidence to suggest that the anticipated benefits of the legislative changes have been realised despite the best efforts of police conducting a variety of well-planned and executed operations. While the changes provided some additional flexibility and mobility of operations, a critical examination of the results does not support the view that operations were less predictable and more difficult to evade. As noted above, larger amounts of drugs were seized during the 9 border areas trial operations than during the 23 drug detection trial operations.

Factors impacting on effectiveness

The majority of police we consulted during the review were of the view that drug detection trial operations are an ineffectual and impractical tool for targeting persons involved in the trafficking of indictable quantities of prohibited drugs. Police identified a number of factors that impacted on the success of drug detection trial operations.

The biggest factor impacting on the effectiveness of operations was the dissemination of information about the nature and location of operations via CB radio and mobile phone networks. This widespread dissemination of information about operations hampered the capacity of police to achieve an 'element of surprise', which is a critical factor to the success of any drug-related operation.

Another significant factor impacting on the effectiveness of operations is the capacity of drug detection dogs to detect the scent of prohibited drugs while screening the exterior of vehicles. The fact that no indictable quantities of drugs were detected in the cargo areas of heavy vehicles appears to indicate that the dogs may not be able to consistently detect the scent of drugs secreted in heavy vehicles.

Police also suggested that a number of the legislative requirements such as the search area restriction and the inability to direct drivers to open doors, as well as the various occupational health and safety requirements, impacted on the effectiveness of operations.

Conclusion

A critical examination of the results leads to the conclusion that the trial powers are demonstrably ineffectual in assisting police to apprehend drug couriers. Despite the best efforts of police, only a small number of people were detected with drugs during operations and the majority of those people were involved in 'minor possession' offences rather than drug couriers with large amounts of drugs. Of those people detected with drugs, most were in possession of extremely small amounts of cannabis. The most common legal action was the issue of a cannabis caution, which suggests that most people found with drugs had little or no previous dealings with police.

We found that the anticipated operational flexibility was largely unachievable in practice for a number of reasons including the need to ensure the safety of police officers and members of the public during operations, and the availability of drug detection dogs in regional areas for any length of time.

There are also a number of seemingly insurmountable challenges facing police during drug detection trial operations. The rapid dissemination of information about the nature and location of police activities via CB radio and mobile phone networks restricts the 'element of surprise', which is an essential ingredient of any effective strategy targeting organised drug traffickers. In addition, the limited ability of drug detection dogs to accurately detect the scent of prohibited drugs while screening the outside of vehicles seriously undermines the capacity of police to target heavy vehicles involved in the trafficking of drugs.

These fundamental challenges cause us to have considerable reservations about whether drug detection operations, or operations employing a similar methodology, will ever result in the cost-effective detection and/or frustration of persons involved in organised drug trafficking on a sustained basis.

After reviewing the trial powers on two separate occasions, it is our view that the only possible conclusion that can be drawn is that the powers do not assist or properly equip police to tackle the vehicular trafficking of indictable quantities of drugs as intended.

Recommendations

	Recommendations	Report reference
1.	In light of the observations and findings detailed throughout this report, Parliament give consideration to allowing the <i>Police Powers (Drug Detection Trial) Act 2003</i> to expire pursuant to section 23(2) of the Act.	p 88
2.	Noting the minimal success of the border areas and drug detection trials, Parliament consider whether there is any merit in continuing to trial the powers given the evidence of their limited utility in assisting police to detect persons involved in the vehicular trafficking of indictable quantities of prohibited drugs.	p 88

Chapter 1.

Introduction

1.1. Background

In 2003 the NSW Government introduced the Police Powers (Border Areas Trial) Bill 2003 into Parliament in response to requests from police seeking new powers to tackle the vehicular trafficking of prohibited drugs between New South Wales, Victoria and South Australia.

As the law stood at the time, police could only stop, search and detain a vehicle if they suspected on reasonable grounds that drugs were in the particular vehicle. This requirement constrained police who had developed profiles about the routes, vehicles, times and concealment methods utilised by drug traffickers.

In an attempt to address this constraint, Parliament enacted legislation to trial giving police the power to conduct operations based on 'generic intelligence' — that is, generalised (rather than specific) information about the trafficking of drugs in particular geographical areas such as highways.

The *Police Powers (Drug Detection in Borders Area Trial) Act 2003* ('the Border Areas Trial Act'), which commenced on 15 January 2004, established an 18-month trial giving police the power to set up roadside check points to stop and screen vehicles with drug detection dogs. The Border Areas Trial Act was specifically aimed at detecting the trafficking of indictable quantities of prohibited drugs.¹

The Parliament required the Ombudsman to monitor the first nine months of operation of the Border Areas Trial Act. A report detailing our activities, findings and recommendations was provided to the Attorney General, Minister for Police and Commissioner of Police on 10 January 2005.² The Attorney General tabled the report in Parliament on 25 October 2006.

Our review found that despite the professional and diligent efforts of police, the objective of the Borders Areas Trial Act — to effectively target the trafficking of indictable quantities of prohibited drugs — had not been met. During the review period police conducted nine operations involving 234 officers at a cost of \$669,188, which included infrastructure upgrades costing \$410,000. Two indictable quantities of drugs were seized but neither seizure resulted in a successful supply prosecution.

We noted that police were in some respects hampered by requirements of the legislation and we made various recommendations aimed at improving police practice and procedure should the Parliament consider extending the trial. However, the results and cost of the trial led us to question whether the continued allocation of public resources to the trial was in the public interest. We also noted that there might be more cost effective strategies to target vehicles carrying significant quantities of drugs. Accordingly, we recommended that Parliament consider allowing the Border Areas Trial Act to expire pursuant to the sunset clause.

The Border Areas Trial Act expired on 15 July 2005 pursuant to the sunset clause. Police did not conduct any further operations after the delivery of our final report on 10 January 2005.

1.2. Further drug detection trial

On 25 October 2006, the day our report into the Border Areas Trial Act was tabled in Parliament, the media reported that the Minister for Police would announce a further drug detection trial enabling police to stop and screen vehicles on any main road across the state.³ One media report suggested that police would be able '*to conduct snap raids without warrants*'. The Minister for Police was quoted as saying:

*These lightning searches maintain the element of surprise — reducing the chance of drug traffickers disposing of evidence and evading detection by using alternative routes.*⁴

On 14 November 2006, the NSW Government introduced the Police Powers Legislation Amendment Bill 2006 into Parliament. The bill provided for the revival of the Border Areas Trial Act — to be known as the Drug Detection Trial Act — by establishing a further 18-month trial that:

*... steps up the fight against the transportation of illicit drugs into, out of, and around New South Wales. The new regime ... will incorporate the changes to police practice and procedure recommended by the Ombudsman following his review of the previous scheme.*⁵

The bill proposed a number of changes to the previous scheme aimed at *'increasing the flexibility and mobility of operations, as well as making the operations less predictable and more difficult to evade.'*⁶

During parliamentary debate on the bill, the Leader of the Opposition in the Legislative Council, when referring to our report into the Border Areas Trial, made the following comments:

*The Government has chosen to continue with the trial, despite the report's conclusion. The Government has indicated that these amendments go beyond the recommendations of the New South Wales Ombudsman, and has said it will put in place a trial process that will be better than if the recommendations were implemented.*⁷

The revived Border Areas Trial Act — renamed the *Police Powers (Drug Detection Trial) Act 2003* ('the Drug Detection Trial Act') — commenced on 23 February 2007.

1.3. Our role and this report

The Drug Detection Trial Act required the Ombudsman to keep under scrutiny the exercise of functions conferred on police officers for 12 months from the date of commencement ('the review period').⁸ For this purpose, the Ombudsman could require the Commissioner of Police or any other public authority to provide information about the exercise of the functions.⁹ In addition, the Ombudsman could inspect the records of police at any time.¹⁰

The Drug Detection Trial Act also required the Ombudsman to prepare a report of the work and activities and to furnish a copy of the report to the Attorney General, Minister for Police, and the Commissioner of Police no later than three months after the expiration of the review period.¹¹

The Attorney General is to lay, or cause to be laid, a copy of the report before both Houses of Parliament as soon as practicable after receipt.¹²

1.4. Methodology

For this review we conducted a range of research activities and relied on a variety of information sources including:

- Participation as an observer in the Steering Committee¹³ overseeing the implementation of the Drug Detection Trial Act.
- Direct observation of operations — we observed 8 (35%) of the 23 operations pursuant to a Memorandum of Understanding ('MOU') between the Commissioner of Police and the NSW Ombudsman.¹⁴
- Interviews with a range of police officers involved in the organisation, planning, execution and evaluation of operations — we interviewed a total of eleven mainly senior officers of various ranks (Assistant Commissioner, Superintendent, Inspector, Sergeant, and Senior Constable) and positions (Region Commander, NSW Police Force Corporate Spokesperson for the drug detection trial, Dog Unit Commander, Local Area Commander, Region Operations Manager, Crime Manager, Crime Co-ordinator, Criminal Investigator (detective), and Highway Patrol Sergeant). We also informally sought the views of police officers during observations we attended as observers.
- Attendance as an observer at a post-operation and future-planning meeting.
- Analysis of information provided by the NSW Police Force about the planning, authorisation, conduct and results of operations.¹⁵
- Examination of intelligence material presented to, and the authorisation process adopted by designated officers.
- Interview with the manager of a petrol station truck stop (roadhouse) where one of the operations was conducted.
- Examination and analysis of records made on the NSW Police Force Computerised Policing System ('COPS').
- Review of court transcripts for drug-related charges that had been finalised — we reviewed a total of 53 transcripts.
- Inspection of records at the Dog Unit.
- Review of complaints and local management issues arising out of operations.
- Telephone survey of persons directly affected by the use of the powers — we surveyed 31, or 6% of all persons who were stopped and searched by police during operations.
- Follow-up recommendations contained in two previous Ombudsman reports involving drug detection dogs: *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003* and the *Review of the Police Powers (Drug Detection Dogs) Act 2001*.

- Circulation of an Issues Document to the NSW Police Force, the Attorney General's Department, and the Police Association of New South Wales. We received detailed responses from the NSW Police Force and the Police Association of NSW.
- Provision of the draft final report to the Commissioner of Police for comment, identification of any errors, and identification of any material that, if published, would jeopardise operational safety of police.

1.5. Previous Ombudsman reports relevant to this review

As discussed above, the Ombudsman also reviewed the Border Areas Trial Act, which involved a similar scheme to that established by the Drug Detection Trial Act. Our observations, findings and recommendations of that review are contained in our report titled: *Review of the Police Powers (Border Areas Trial) Act 2003*.¹⁶

Accordingly, we suggest that this report be read in conjunction with our previous report as we have endeavoured, as far as possible, to avoid duplication of material covered in that report. Where appropriate, this report contains cross-references to relevant sections of our previous report.

In addition, we suggest that this report also be read in conjunction with our report: *Review of the Police Powers (Drug Detection Dogs) Act 2001*¹⁷ as that report contains detailed discussion of issues associated with the use of drug detection dogs by police.

Endnotes

- ¹ See Table 2 (at paragraph 3.3) for an outline of what constitutes an indictable quantity.
- ² NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005. A copy of the report can be downloaded from: www.ombo.nsw.gov.au/publication/otherreports.asp.
- ³ 'Drug dogs in random car search', *The Daily Telegraph*, 25 October 2006, p.12. See also: 'Ombudsman highlights ineffective police drug operations', ABC NSW, <http://www.abc.net.au/news/items/200610/1774882.htm?nsw>, 27 October 2006; and 'Police support review of car drug searches', *Deniliquin Pastoral Times*, 28 October 2006, p.7.
- ⁴ 'Drug dogs in random car search', *The Daily Telegraph*, 25 October 2006, p.12.
- ⁵ Ms Linda Burney, Parliamentary Secretary, NSWPD, Legislative Assembly, 14 November 2006, p.102. See also the Hon. Henry Tsang, Parliamentary Secretary, NSWPD, Legislative Council, 16 November 2006, p.4164.
- ⁶ Ms Linda Burney, Parliamentary Secretary, NSWPD, Legislative Assembly, 14 November 2006, p.102. See also the Hon. Henry Tsang, Parliamentary Secretary, NSWPD, Legislative Council, 16 November 2006, p.4164.
- ⁷ The Hon. Michael Gallacher, NSWPD, Legislative Council, 16 November 2006, p.4164.
- ⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.22(1).
- ⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.22(2)(a).
- ¹⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.22(2)(b).
- ¹¹ *Police Powers (Drug Detection Trial) Act 2003*, s.22(3).
- ¹² *Police Powers (Drug Detection Trial) Act 2003*, s.22(5)–(7).
- ¹³ The committee was co-ordinated by the Ministry for Police. The committee comprised of senior police from the Northern, Southern and Western regions; the Drug and Asian Crime Squads; and the Dog Unit. In addition, staff from the Ministry for Police and the Commissioner's Inspectorate participated in meetings.
- ¹⁴ See Appendix 1 for a copy of the MOU.
- ¹⁵ See Appendix 2 for a copy of the Information Requirements document.
- ¹⁶ NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005. A copy of the report can be downloaded from: www.ombo.nsw.gov.au/publication/otherreports.asp.
- ¹⁷ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006. A copy of the report can be downloaded from: www.ombo.nsw.gov.au/publication/otherreports.asp. Hard copies of this report are also available on request.

Chapter 2.

Drug detection operations

This chapter outlines the key provisions of the Drug Detection Trial Act and explains the main changes made to the previous border areas trial. It also contains a brief description of how police plan, conduct and report on operations.

2.1. Key provisions of the Drug Detection Trial Act¹⁸

The Drug Detection Trial Act defines a *drug detection operation* as an operation carried out for the purposes of obtaining evidence of, or frustrating, any criminal activity involving the supply of prohibited drugs or prohibited plants, or for the purpose of arresting any person involved in any such criminal activity, or for any combination of those purposes.¹⁹

2.1.1. Application for an authorisation to conduct a drug detection operation

A police officer who suspects on reasonable grounds that any part or all of an area is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs or prohibited plants may apply to a designated officer for an authorisation to conduct a drug detection operation.²⁰

A *designated officer* is defined as the Commissioner of Police, a Deputy Commissioner of Police, an Assistant Commissioner of Police, or a police officer at or above the rank of Superintendent authorised by the Commissioner of Police to exercise the functions of a designated officer.²¹

An application for authorisation must be made in writing and contain the following particulars:²²

- a statement identifying the proposed search area
- the grounds on which the authorisation is sought
- a plan of the proposed operation including the number of officers and drug detection dogs proposed to be used
- a statement setting out consultation that has taken place with the Roads and Traffic Authority ('RTA')
- a statement providing details of any previous applications for authorisation for the proposed search area within the last 12 months
- a statement outlining the results of any operations under the Drug Detection Trial Act conducted in the proposed search area within the last 12 months, and
- the proposed expiry date for the authorisation.

The designated officer may require additional information from the police officer applicant as is necessary for proper consideration of the application for authorisation.²³

2.1.2. Restrictions on search areas

The *search area* in an authorisation may consist of up to three areas located in outer metropolitan areas — that is, areas outside Sydney, Newcastle and Wollongong. Each area must not be more than five square kilometres in area.²⁴

2.1.3. Grant of authorisation

A designated officer may, after receiving an application from a police officer, grant an authorisation (either unconditionally or subject to conditions)²⁵ that authorises the exercise of powers under the Drug Detection Act in connection with a drug detection operation.²⁶

A designated officer may grant the authorisation only if satisfied that:²⁷

- there are reasonable grounds for suspecting that any part or all of the proposed search area is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs, and
- the nature and extent of the proposed operation to be carried out is appropriate to the suspected criminal activity.

When considering these matters, the designated officer is to have regard to:²⁸

- the reliability of any information on which the application is based, and
- the likelihood of success of the proposed operation compared with the likelihood of success of any other law enforcement operation that would be reasonably practicable to conduct for the same purposes.

In addition, if the authorisation is granted, the designated officer is to make a record of the reasons for being satisfied about these matters.²⁹

If a designated officer refuses an application for authorisation, the police officer who made the application, or any other police officer who is aware of the application, may not make a further application unless the further application provides additional information that justifies the making of the further application.³⁰

An authorisation has effect from the time it is granted and ends at the time specified in the authorisation unless revoked sooner by the police officer who granted the authorisation or a designated officer of a more senior rank.³¹

The period during which an authorisation has effect must not exceed 14 days, beginning on the day on which it is granted.³²

An authorisation cannot be extended but a further authorisation may be granted for the same or part of the same search area.³³

2.1.4. Functions police can exercise after an authorisation is granted

Once an authorisation has been granted, a police officer (with the aid of such assistants considered necessary),³⁴ may (subject to any conditions specified in the authorisation),³⁵ exercise any or all of the following functions in the search area:³⁶

- establish one or more check points (and at any time during which the authorisation is in force, remove a check point from one location and re-establish it at another location in the search area)³⁷
- stop vehicles at a check point
- if a vehicle is stopped at a check point or stopped in the search area, use a dog to carry out general drug detection in relation to a person in or on, or seeking to enter or leave, the vehicle or in relation to the vehicle
- seize and detain any prohibited drug or prohibited plant in the possession or under the control of a person in contravention of the *Drug Misuse and Trafficking Act 1985* found as a result of general drug detection using a dog or any search of a person that the police officer is entitled to carry out
- seize and detain any thing found in the course of general drug detection using a dog or any such search that the police officer suspects on reasonable grounds may provide evidence of the commission of an indictable offence, and
- give reasonable directions to facilitate the exercise of any powers under this section to any person in the search area.

General drug detection is defined as the detection of prohibited drugs or prohibited plants in the possession or under the control of a person, except during a search that is carried out after a police officer reasonably suspects that the person is committing a drug offence.³⁸

A police officer authorised to use a dog to conduct general drug detection under an authorisation may:³⁹

- use the dog for general drug detection outside any vehicle, and
- if a vehicle is used for commercial purposes (including the transport of goods), or is a public passenger vehicle, allow the dog to enter an area of the vehicle that is not a driver or passenger area of the vehicle (for example, the boot, back of a goods vehicle or luggage hold of a coach)

and must comply with the following:⁴⁰

- the police officer is to take all reasonable precautions to prevent the dog touching a person
- the police officer is required to keep the dog under control
- the police officer must not allow the dog to enter any driver or passenger area of a vehicle except where the police officer is entitled to search it and all persons have left the area to be searched
- the police officer must not direct a person to open the door of a vehicle unless the police officer is entitled to search the person or vehicle or is otherwise entitled to give such a direction, and
- the police officer must not direct a person to open an area of a vehicle that is not a driver or passenger area of the vehicle, unless the vehicle is used for commercial purposes (including the transport of goods) or is a public passenger vehicle.

The Drug Detection Trial Act does not confer on a police officer the power to search a person,⁴¹ or the power to enter a vehicle, with the exception of vehicles used for commercial purposes as outlined above.⁴²

However, a police officer is entitled to search a person or vehicle if another Act or law authorises the search.⁴³ To avoid any doubt, the Drug Detection Trial Act expressly states that its provisions do not affect or apply to the search

of a person whom a police officer reasonably suspects is committing a drug offence or any other search of a person or vehicle that a police officer is entitled to carry out.⁴⁴

2.1.5. Requirements for the exercise of functions by police

Before conducting general drug detection on a vehicle stopped at a check point or stopped in the search area, a police officer must provide the person subject to the power with the following:⁴⁵

- evidence that the police officer is a police officer (unless the police officer is in uniform)
- the name of the police officer and his or her place of duty, and
- the reason for the exercise of the power.

In addition, a police officer who exercises a function under an authorisation must give the person subject to the exercise of the function a written notice⁴⁶ containing the following particulars:⁴⁷

- the name of the police officer and his or her place of duty, and
- the date, time and place at which the function was exercised.

The notice must be given before, on or as soon as practicable after exercising the function.⁴⁸

2.1.6. Other requirements for the exercise of functions by police

A police officer who exercises a function under an authorisation must ask for the person's co-operation and carry out the function:⁴⁹

- in a way that provides reasonable privacy for the person subject to the exercise of the function, and
- as quickly as is reasonably practicable.

If a police officer exercises a power that involves making a request that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request, provide the person the subject of the request with:⁵⁰

- a warning that the person is required by law to comply with the request (unless the person has already complied or is in the process of complying), and
- if the person does not comply with the request after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request is an offence.

A police officer who establishes a check point must ensure that adequate measures are taken to ensure the safety of persons and vehicles approaching the check point.⁵¹

2.1.7. Offences created by the Drug Detection Trial Act

The Drug Detection Trial Act creates three new offences each with a maximum penalty of \$1,100:

A person must not, without reasonable excuse:

1. obstruct or hinder a person exercising functions under an authorisation⁵²
2. fail or refuse to stop a vehicle the person is driving when directed to do so by a police officer exercising functions under an authorisation,⁵³ and
3. fail or refuse to comply with any other direction given by a police officer exercising functions under an authorisation.⁵⁴

The onus of proof of reasonable excuse for these offences lies with the accused person.⁵⁵

Proceedings for these offences are to be dealt with summarily by a Local Court.⁵⁶

2.1.8. Other police powers not affected by the Drug Detection Trial Act

Nothing in the Drug Detection Trial Act prevents or affects a police officer from:

- applying for a search warrant under the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA')⁵⁷
- exercising a function under the *Police Powers (Drug Detection Dogs) Act 2001*, including applying for a warrant under that Act,⁵⁸ or
- exercising any other function under this or any other Act or law at, or in relation to, a search area or a vehicle or person in a search area.⁵⁹

2.1.9. Reporting and record keeping requirements

Within 14 days after the expiry of an authorisation, the police officer to whom the authorisation was granted must cause a report to be given to the designated officer who granted the authorisation:⁶⁰

- stating whether or not the operation proposed to be carried out under the authorisation was carried out
- if the operation was carried out — setting out briefly the result of the operation (including a brief description of anything seized), and
- if the operation was not carried out — setting out briefly the reasons why the operation was not carried out.

In addition, the Commissioner of Police must cause a record to be kept of the number of authorisations granted, and the number of operations conducted, with details of the following for each operation:⁶¹

- the number of police officers and the number of dogs used
- the duration of the operation
- the number of vehicles stopped and the number of vehicles searched as a result of the operation
- the number of persons searched as a result of the operation
- the reason for each search conducted as a result of the operation, and
- the number and nature of things seized and detained, including the kinds and quantity of any prohibited drugs or prohibited plants found as a result of each search or other action undertaken.

A summary of this information is to be included in the annual report of the NSW Police Force.⁶²

2.1.10. Sunset clause

The Drug Detection Trial Act expires 18 months after its revival — that is, on 22 August 2008.⁶³

2.2. Main changes to the Border Areas Trial Act⁶⁴

The revived Drug Detection Trial Act contains a number of changes to the previous drug detection trial established by the Border Areas Trial Act. The changes aim to increase the flexibility and mobility of operations, and make operations less predictable and more difficult to evade.⁶⁵

The principal change is that drug detection operations are now conducted pursuant to an *authorisation* granted by a NSW Police Force designated officer. Under the Border Areas Trial Act, operations were conducted pursuant to a *warrant* issued by an eligible judge of the Supreme Court.

In addition, the application process has been simplified. Under the Border Areas Trial Act the application process involved two steps.⁶⁶ First, a police officer had to apply in writing to the Commissioner or a Deputy Commissioner of Police for an authorisation to apply for a drug detection warrant.⁶⁷ Second, upon receiving the authorisation, the police officer would then apply to an eligible judge of the Supreme Court for a drug detection warrant authorising the operation.⁶⁸ Under the Drug Detection Trial Act a police officer is only required to apply to a designated officer for an authorisation to conduct a drug detection operation.

A further change — outlined above (at paragraph 2.1.3) — is that designated officers must be satisfied that the nature and extent of the proposed operation is appropriate to the suspected criminal activity. When reaching the requisite level of satisfaction, the designated officers must also have regard to the reliability of any information on which the application is based, and the likelihood of success of the proposed operation when compared to any other law enforcement operation that would be reasonably practicable to conduct for the same purpose.

Another key change is the extension of geographical areas in which operations can be conducted. Under the Border Areas Trial Act, operations were restricted to certain southern 'border areas' of New South Wales. Under the Drug Detection Trial Act, operations can be conducted in 'outer metropolitan areas' — essentially anywhere outside Sydney, Newcastle and Wollongong.

In addition, the size of search areas has increased from 1km² under the Border Areas Trial Act, to 5km² under the Drug Detection Trial Act, although there is still a restriction of three search areas per authorisation. Further, authorisations under the Drug Detection Trial Act can have effect for up to 14 days, up from 72 hours for warrants granted under the Border Trials Act. Furthermore, police may establish more than one checkpoint at a time, and move it at any time.⁶⁹ To complement this change, the Border Areas Trial Act requirement that police erect signs to indicate the presence of a check point has been replaced with a requirement that police take adequate measures to ensure the safety of persons and vehicles approaching the check point.

2.3. Planning, conducting and reporting on drug detection operations⁷⁰

Police are guided in almost all aspects of the planning and execution of drug detection operations by the Standard Operating Procedures ('SOPs') for the drug detection trial.⁷¹ In addition, SOPs regulating other areas of police practice may also be utilised. For example, SOPs outlining procedures for assessing the suitability of check points,⁷² and safely stopping vehicles during operations⁷³ also guide police in planning and conducting operations.

2.3.1. Preparing for drug detection operations

There are a number of steps involved in planning a drug detection operation that occur weeks and in some instances months before an operation is conducted.

A police officer who suspects on reasonable grounds that particular roads or highways in their local area command are being used on a regular basis for, or in connection with, the supply of indictable quantities of prohibited drugs gathers information and evidence to establish the grounds for an application for authorisation.⁷⁴

The officer determines the size and scope of the planned operation including the number of police officers and drug detection dogs required. The size of any operation is determined by the objective of the operation and available resources (such as police officers and drug detection dogs).

The officer, after consulting with the Roads and Traffic Authority, identifies suitable locations to conduct the operation and performs site assessments utilising a risk management tool which addresses occupational health and safety issues. The officer may also develop a traffic management plan for the site/s to be used during the operation.

The officer compiles a plan for the operation, which police call 'operational orders'. In addition to the above information, operational orders generally contain:

- background information about the purpose and scope of the operation
- details about the execution of the operation including an outline of the various roles, duties and responsibilities of officers involved
- a brief description of legislative and procedural requirements, and
- intelligence material that may be useful for officers participating in the operation (for example, details of drug concealment methods or persons and/or vehicles to be targeted).

The officer drafts an application for authorisation using a template contained in the SOPs. The draft application is forwarded to NSW Police Force Legal Services who provide advice on whether the application meets the legislative requirements of the Drug Detection Trial Act. The officer makes any suggested changes and then arranges for the application to be placed before a designated officer for the grant of an authorisation.

2.3.2. How police conduct drug detection operations

Police usually conduct an operational briefing before commencing drug detection operations. At the briefing the officer in charge provides a detailed outline of how the operation will be executed including a discussion of the roles and responsibilities of participating officers. The briefing also provides an opportunity for officers to clarify any issues.

As discussed above (at paragraph 2.1.4), the Drug Detection Trial Act gives police the power to screen vehicles with drug detection dogs in two discrete ways. A vehicle can be directed to stop at a check point and screened, or police can screen vehicles stopped anywhere in the authorised search area.

2.3.2.1. Vehicles stopped at a check point

When a vehicle is initially stopped by police at a check point it is directed to the 'cold zone' where an officer — known as the 'scribe' — provides the driver with verbal and written information⁷⁵ about the purpose of the stop. Police generally ask drivers of heavy vehicles to step down from the cabin to provide this information. The drug detection dog is then led around the outside of the vehicle and the driver, if she or he has alighted from the vehicle. The drug detection dog is also authorised to screen certain non-passenger areas of commercial vehicles such as cargo holds of heavy vehicles and luggage holds of coaches.

If the drug detection dog does not indicate to its handler that it has detected the scent of a prohibited drug, the driver is usually thanked for their cooperation and directed out of the check point. This process usually takes no more than a few minutes. However, police may also perform other functions such as random breath testing or log-book compliance checking before or after the vehicle is screened by a drug detection dog, which invariably adds to the processing time.

If the drug detection dog indicates to its handler that it has detected the scent of a prohibited drug — which usually, but not always, involves the dog sitting down — the handler explains to the driver that the dog has made an indication and that police may conduct a search of the vehicle, the driver and/or any passengers. The dog handler gives the driver a legal caution⁷⁶ when explaining that the dog has indicated the scent of a prohibited drug.

After an indication, the driver of the vehicle is usually directed to move the vehicle to a searching area known as the 'hot zone', which is usually some distance from the 'cold zone', so as to provide some level of privacy for those being searched and to ensure the free flow of vehicles through the 'cold zone'. In the 'hot zone', police may search the vehicle, the driver and/or any passengers. The searches are usually captured on videotape. Police may also utilise the drug detection dog to assist in searching persons and/or vehicles. The searches can take anywhere from five minutes to over an hour, depending on how thoroughly police decide to search and what is discovered during the search.

If drugs are located, they are seized and appropriate investigations are conducted either at the site, or at a police station depending on the nature and seriousness of the offence detected. For example, if police seize a small amount of drugs, the person is generally processed at the check point. This involves either the issue of a cannabis caution (in appropriate circumstances) or a Field Court Attendance Notice ('FCAN').⁷⁷ If police seize a large amount of drugs — such as an indictable quantity — the person is placed under arrest and taken to the closest police station for further investigation and charging.

2.3.2.2. Vehicles stopped in the search area

When a vehicle is stopped in the search area, police may approach it and screen it with a drug detection dog in the same manner as a vehicle stopped at a check point. The only difference being that if the drug detection dog indicates the scent of a prohibited drug, the vehicle, the driver and/or any passengers are usually searched at the location. Alternatively, police may direct the driver to move the vehicle to a 'hot zone' at an established checkpoint to conduct the search.

2.3.3. Post-operation de-brief and reporting

At the conclusion of an operation, police generally conduct an operational de-brief, which provides officers with an opportunity to reflect upon the operation and identify any issues arising.

The officer in charge may also compile a 'situation report' outlining the results of the operation and other information of significance. Situation reports are disseminated to local area and region commanders for information purposes.

In addition, the officer to whom the authorisation was granted must also ensure that a report on the conduct and results of the operation is given to the designated officer within 14 days of the expiry of the authorisation.

2.4. Types of drug detection operations

During the review period police conducted operations utilising both 'static' and 'mobile' check point strategies.

2.4.1. 'Static' operations

A static operation involves a fixed check point (such as a parking bay, truck stop or RTA Heavy Vehicle Checking Station) at which police stop vehicles for screening.⁷⁸

While conducting static operations, police sometimes deploy 'roving' or 'floating' highway patrol vehicles in and around the search area to help target vehicles to be stopped. The targeting of vehicles by roving highway patrol officers is usually based on information from radio checks on vehicles, the officer's observations, and/or knowledge of the *modus operandi* of drug traffickers. When a vehicle of interest is identified, the highway patrol officer contacts the check point by radio and suggests that they stop the vehicle.

On occasion, police utilise complementary strategies when conducting static operations. For example, a significant factor impacting on the effectiveness of drug detection operations is the dissemination of information about the nature and location of operations. This frequently occurs via the Citizens Band (CB or UHF) radio network.⁷⁹ Some heavy vehicle drivers who become aware of operations via CB radio elect to stop at parking bays and truck stops to avoid police scrutiny.⁸⁰ In an attempt to combat this practice, police sometimes conducted operations consisting of a main check point, with smaller operations at truck stops and parking bays where their intelligence suggested heavy vehicles drivers might gather to 'sit out' the operation. These complementary operations involved both screening of vehicles stopped at the truck stop or parking bay, and directing vehicles to a specific location within the parking bay or truck stop where police had also established a check point.

2.4.2. 'Mobile' operations

After conducting a number of static operations, police acknowledged that the results were 'disappointing'. In light of this, police resolved to continue with the trial with the proviso that future operations be smaller in scale, shorter in duration, more flexible and mobile. Police hoped that mobile operations would be less predictable and more difficult to evade.⁸¹

A mobile operation involves police moving around search areas rather than remaining static at a fixed checkpoint. During a mobile operation:

- roving highway patrol vehicles play an active role in directing or escorting targeted vehicles into pre-established check points
- check points are generally smaller and more discreet, and
- police and the drug detection dog usually attend the check point after a vehicle is stopped.

Under the Drug Detection Trial Act, police must establish a check point before stopping vehicles at the check point. In order to comply with this requirement during mobile operations, police identify various check point locations during the planning phase and conduct safety assessments at each site.

The following extract from operational orders illustrates how police planned to conduct mobile operations:

Police will randomly select vehicles, trucks and buses travelling north and south along [name of highway, location] using mobile patrols just prior to the [three] authorisation areas. Once a vehicle is identified this vehicle will be pulled into one of the selected check points with the assistance of two fully marked highway patrol vehicles. Police will use the experience and expertise of highway patrol officers to be able to manoeuvre the selected vehicles into the check point areas.⁸²

It is worth noting that a number of mobile operations centred on locations utilised during static operations such as truck stops or parking bays with the only difference being that vehicles were directly escorted into the unattended check points by roving highway patrol officers.

Endnotes

¹⁸ There is no comparable legislation in any state or territory of Australia.

¹⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.5(2).

²⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.6(1).

²¹ *Police Powers (Drug Detection Trial) Act 2003*, s.4. No more than two police officers at a time may be authorised by the Commissioner of Police to exercise designated officer functions.

²² *Police Powers (Drug Detection Trial) Act 2003*, s.6(2)(a)–(g).

²³ *Police Powers (Drug Detection Trial) Act 2003*, s.6(3).

²⁴ *Police Powers (Drug Detection Trial) Act 2003*, s.7. Section 3(1) defines **outer metropolitan area** as any land within the State that is located outside the metropolitan area of the State (with the metropolitan area of the State being the area to the east of the State bounded by, and including, the local government areas of Newcastle City, Lake Macquarie City, Wyong, Gosford City, Hawkesbury City, Blue Mountains City, Penrith City, Liverpool City, Camden, Campbelltown City, Wollongong City and Shellharbour City).

²⁵ *Police Powers (Drug Detection Trial) Act 2003*, s.8(3).

²⁶ *Police Powers (Drug Detection Trial) Act 2003*, s.5(1).

²⁷ *Police Powers (Drug Detection Trial) Act 2003*, s.8(1)(a) and (b). In addition, the designated officer must be satisfied that the application has been made in accordance with the legislation and the proposed search area complies with the legislation: s.8(1)(c) and (d).

²⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.8(2)(a) and (b).

²⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.8(5).

³⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.8(6).

³¹ *Police Powers (Drug Detection Trial) Act 2003*, s.14(1) and s.15(1). A revocation of an authorisation does not affect anything lawfully done in reliance on the authorisation before it ceased to have effect. In addition, s.15A provides that an application for an authorisation, and any authorisation granted on the basis of such an application, is not invalidated by any procedural defect, other than a defect that affects the substance of the application or authorisation in a material particular.

³² *Police Powers (Drug Detection Trial) Act 2003*, s.14(2).

³³ *Police Powers (Drug Detection Trial) Act 2003*, s.14(3).

³⁴ *Police Powers (Drug Detection Trial) Act 2003*, s.18A.

³⁵ *Police Powers (Drug Detection Trial) Act 2003*, s.9(2).

³⁶ *Police Powers (Drug Detection Trial) Act 2003*, s.9(1)(a)–(f).

³⁷ *Police Powers (Drug Detection Trial) Act 2003*, s.10(1).

³⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.3(1).

³⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.11(3)(a) and (b).

⁴⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.11(2)(a)–(f).

- ⁴¹ *Police Powers (Drug Detection Trial) Act 2003*, s.18(3)(b).
- ⁴² *Police Powers (Drug Detection Trial) Act 2003*, s.18(3)(a).
- ⁴³ *Police Powers (Drug Detection Trial) Act 2003*, s.9(2). For example, under sections 21(1)(d) and 36(1)(e) of the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA'), a police officer is entitled to search a person or vehicle where the officer suspects on reasonable grounds that a person is in possession or control of, or the vehicle contains, a prohibited drug.
- ⁴⁴ *Police Powers (Drug Detection Trial) Act 2003*, s.18(2).
- ⁴⁵ *Police Powers (Drug Detection Trial) Act 2003*, s.9(3)(a)–(c). This corresponds with the safeguards in s.201(1) of LEPRA.
- ⁴⁶ See Appendix 3 for a copy of a notice utilised by police.
- ⁴⁷ *Police Powers (Drug Detection Trial) Act 2003*, s.12(1)(a) and (b).
- ⁴⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.12(2).
- ⁴⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.13(a) and (b).
- ⁵⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.9(4)(a) and (b). This corresponds with the safeguard in s.201(2C) of LEPRA.
- ⁵¹ *Police Powers (Drug Detection Trial) Act 2003*, s.10(2).
- ⁵² *Police Powers (Drug Detection Trial) Act 2003*, s.16(1).
- ⁵³ *Police Powers (Drug Detection Trial) Act 2003*, s.16(2)(a).
- ⁵⁴ *Police Powers (Drug Detection Trial) Act 2003*, s.16(2)(b).
- ⁵⁵ *Police Powers (Drug Detection Trial) Act 2003*, s.20.
- ⁵⁶ *Police Powers (Drug Detection Trial) Act 2003*, s.21.
- ⁵⁷ *Police Powers (Drug Detection Trial) Act 2003*, s.18(1)(a).
- ⁵⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.18(1)(b). Note: the provisions of the *Police Powers (Drug Detection Dogs) Act 2001* were transferred to Part 11, Division 2 of LEPRA on 1 December 2005. The *Police Powers (Drug Detection Dog) Act 2001* ceased to be in force from 1 December 2005 — the date of commencement of LEPRA.
- ⁵⁹ *Police Powers (Drug Detection Trial) Act 2003*, s.18(1)(c).
- ⁶⁰ *Police Powers (Drug Detection Trial) Act 2003*, s.15B(a)–(c).
- ⁶¹ *Police Powers (Drug Detection Trial) Act 2003*, s.17(1)(a)–(f).
- ⁶² *Police Powers (Drug Detection Trial) Act 2003*, s.17(2).
- ⁶³ *Police Powers (Drug Detection Trial) Act 2003*, s.23(2).
- ⁶⁴ For an outline of the provisions of the Border Areas Trial Act, see paragraph 4.1 'Provisions of the Act' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.19–23.
- ⁶⁵ Ms Linda Burney, Parliamentary Secretary, NSWPD, Legislative Assembly, 14 November 2006, p.102. See also the Hon. Henry Tsang, Parliamentary Secretary, NSWPD, Legislative Council, 16 November 2006, p.4164.
- ⁶⁶ For a detailed outline of the legislative provisions, see paragraph 4.1.2 'Drug detection warrants' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.19–20.
- ⁶⁷ *Police Powers (Drug Detection in Border Areas Trial) Act 2003*, s.5.
- ⁶⁸ *Police Powers (Drug Detection in Border Areas Trial) Act 2003*, s.6.
- ⁶⁹ It is not entirely clear whether this was not possible under the Border Areas Trial Act. For example, during the Second Reading speech of the *Police Powers (Drug Detection in Border Areas Trial) Bill 2003*, the Minister for Justice, the Hon. John Hatzistergos noted that police could 'establish multiple check points simultaneously' — see NSWPD, Legislative Council, 25 June 2003, p.2042. However, the legislative provision in the Border Areas Trial Act stated that a police officer could 'establish a check point', whereas the similar provision in the Drug Detection Trial Act states that a police officer may 'establish one or more check points'.
- ⁷⁰ For a more detailed discussion of how police plan and conduct drug detection operations, see NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, at Chapter 5 'Conducting an operation and results' (pp.41–49); and Chapters 6–10 (pp.51–101), which contain detailed case studies of similar operations conducted under the Border Areas Trial Act.
- ⁷¹ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007.
- ⁷² NSW Police Force, *Standard Operating Procedures — Stationary Speed Enforcement — LIDAR and RADAR*, March 2007.
- ⁷³ NSW Police Force College, School of Operational Safety and Tactics, *Motor Vehicle Stopping Techniques and Procedures*.
- ⁷⁴ See below (at paragraph 4.1) for a more detailed discussion of the information and evidence used to establish the grounds for an authorisation.
- ⁷⁵ Namely, a section 12 notice. See Appendix 3 for a copy of the notice utilised by police.
- ⁷⁶ Advising the person that they do not have to do or say anything if they do not wish to.
- ⁷⁷ The practice of issuing a cannabis caution or FCAN in the field appears to be inconsistent with the detention after arrest safeguards in Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (previously contained in Part 10A of the *Crimes Act 1900*.) As a result of our review of the border areas trial, we recommended that police comply with the detention after arrest provisions unless or until an appropriate legislative amendment is made — see paragraph 12.12.1 'Part 10A of the *Crimes Act 1900*' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.140–1. Also see paragraph 14.9 'Part 10A of the *Crimes Act 1900*' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.220–3. As part of this review we asked the NSW Police Force to provide an update on the progress of any resolution of the Part 9 issue and we were advised that the Department of Premier and Cabinet has formed a LEPRA issues working party, which is currently considering Part 9 issues — NSW Police Force response to request for further information, 28 February 2008, p.5.
- ⁷⁸ For examples of static operations conducted during the border areas trial, see Chapters 6–10 in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.51–101.
- ⁷⁹ This practice is discussed below (at paragraph 5.5.1).
- ⁸⁰ We note that heavy vehicles drivers may choose to avoid police operations for any number of reasons, which may not necessarily involve drugs. For example, some heavy vehicle drivers may simply want to avoid the possibility of being inconvenienced or delayed by the police operation.
- ⁸¹ Steering Committee meeting, 27 September 2007.
- ⁸² NSW Police Force, *Operational Orders*, Goulburn Local Area Command, December 2007, p.4.

Chapter 3.

Results of drug detection operations

This chapter outlines the results of operations conducted during the review period (23 February 2007 to 22 February 2008).

3.1. Where operations conducted

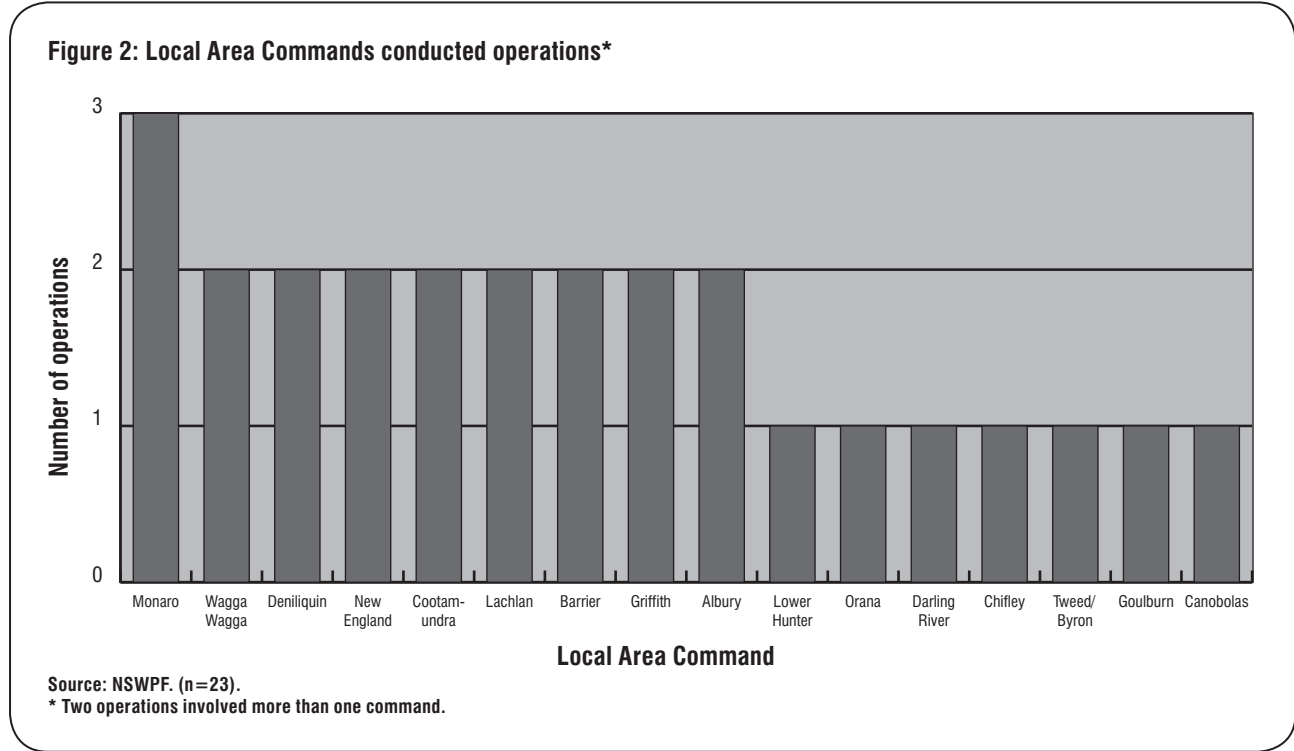
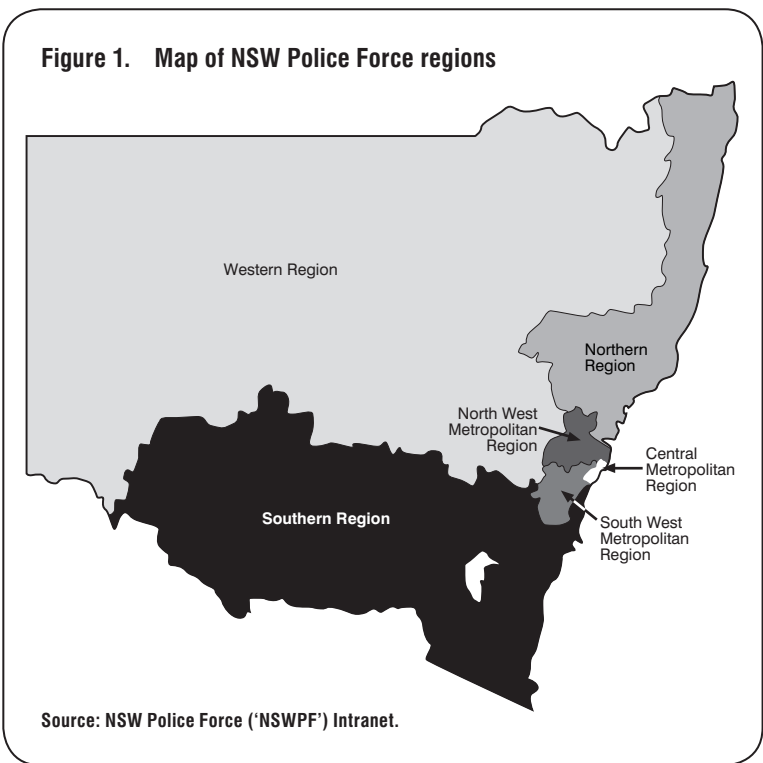
The NSW Police Force has six regions across New South Wales. There are three metropolitan and three non-metropolitan regions as illustrated in Figure 1.

There are 80 local area commands located in the six regions. Each local area command is primarily responsible for its own strategic and business planning.

A total of 23 operations were conducted in the three non-metropolitan police regions. Eleven operations were conducted in Southern Region, ten in Western Region, and two in Northern Region.

Thirteen operations utilised a 'static' check point strategy (operations 1–12, and 14 in Tables 1 and 3) and ten utilised a 'mobile' check point strategy (operations 13, and 15–23).

Figure 2 shows the number of operations conducted by each of the 16 local area commands that participated in the drug detection trial.



3.2. Number of vehicles and persons stopped, screened and searched

Table 1 outlines the results of police stopping and screening vehicles with drug detection dogs during operations.

Table 1. Result of vehicles stopped and screened by drug detection dogs

	Local area command/s where operation conducted	Date/s of operations	No. of vehicles stopped and screened	No. of vehicles searched	No. of persons searched	No. of occasions drug seized ⁸³	Rate of finding drugs ⁸⁴	No. of indictable quantities of drugs seized
1	Wagga Wagga, Cootamundra, Albury	7–9 March 2007	641	51	49	9	18%	1 ⁸⁵
2	New England	22 March 2007	17	2	2	1	50%	Nil
3	Griffith	2–5 July 2007	645	29	48	14	48%	Nil
4	Lachlan	2–5 July 2007	910	14	17	6	43%	Nil
5	New England	25–26 July 2007	132	14	10	3	21%	Nil
6	Deniliquin	29–31 July 2007	215	5	4	2	40%	Nil
7	Monaro	2–4 August 2007	963	31	57	17	55%	Nil
8	Cootamundra	9–10 August 2007	75	11	7	3	27%	Nil
9	Orana	14–15 August 2007	370	35	39	5	14%	Nil
10	Lower Hunter	18–19 August 2007	570	22	44	10	45%	Nil
11	Darling River	20–21 September 2007	536	192 ⁸⁶	12	7	4%	Nil
12	Chifley	15–16 November 2007	541	20	12	2	10%	Nil
13	Wagga Wagga, Albury	27–28 November 2007	93	7	2	0	0	Nil
14	Tweed/Byron	2–3 December 2007	78	15	25	4	27%	1
15	Goulburn	5–6 December 2007	168	8	15	1	13%	Nil
16	Monaro	7–8 December 2007	161	16	28	6	38%	Nil

	Local area command/s where operation conducted	Date/s of operations	No. of vehicles stopped and screened	No. of vehicles searched	No. of persons searched	No. of occasions drug seized ⁸³	Rate of finding drugs ⁸⁴	No. of indictable quantities of drugs seized
17	Deniliquin	12–13 December 2007	66	1	1	0	0	Nil
18	Griffith	13–14 December 2007	37	4	4	1	25%	Nil
19	Barrier	14–16 December 2007	63	7	9	2	29%	Nil
20	Lachlan	17–19 December 2007	193	5 ⁸⁷	2	1	20%	Nil
21	Monaro	3–5 January 2008	451	60	113	33	55%	3 ⁸⁸
22	Canobolas	10–11 January 2008	502	20	15	3	15%	Nil
23	Barrier	19–21 February 2008	100	22	22	3	14%	2 ⁸⁹
	TOTALS		7,527	591	537	133	23%	7

Source: NSWPF and COPS.

3.3. Drugs seized, legal action taken and court outcomes

The principal New South Wales legislation regulating drug offences is the *Drug Misuse and Trafficking Act 1985*. Schedule 1 of that Act contains a list of prohibited drugs and prescribes the quantities for drug offences.

Table 2 outlines the prescribed quantities for the prohibited drugs seized during the drug detection trial.

Table 2. Prescribed quantities for prohibited drugs seized

	Small quantity	Traffickable quantity (also known as deemed supply)	Indictable quantity	Commercial quantity
Cannabis	30.0g	300.0g	1000.0g	25.0kg
Amphetamine [^]	1.0g	3.0g	5.0g	250.0g
Ecstasy	0.25g	0.75g	1.25g	125.0g
Cocaine	1.0g	3.0g	5.0g	250.0g
Nexus ^{^^}	0.08g	0.3g	0.5g	25.0g
Heroin	1.0g	3.0g	5.0g	250.0g

Source: *Schedule 1 of the Drug Misuse and Trafficking Act 1985*.

[^] Throughout this report references to amphetamine include amphetamine-like drugs such as methylamphetamine, which is also known as 'ice' or 'crystal'. These drugs have identical prescribed quantities.

^{^^} This is the street name for the drug. Its actual name is 2C-B and its chemical name is 4-Bromo-2,5-dimethoxyphenethylamine. It has been described as a synthetic psychedelic drug.⁹⁰

Table 3 details drugs seized, legal action taken, and court outcomes for drug detection operations.

Table 3. Drugs seized, legal action taken, and court outcomes

	Local area command/s where operation conducted	Drugs seized <i>(Gross weight in grams)⁹¹</i>	No. of cannabis cautions issued	No. of drug-related charges	Court outcomes⁹²
1	Wagga Wagga, Cootamundra, Albury	Cannabis: 1.0, 3.0, 5.0, 5.0, 5.0, 9.0, 15.0 Amphetamine: 1.0, 4.0, 9.0*	3	Possess prohibited drug: 6	Fine: \$150, \$150, \$300, \$300, \$400, \$600
				Possession of equipment for administering prohibited drug: 4	Fine: \$80, \$100, \$100, \$100
2	New England	Cannabis: 1.0	1	Nil	N/A
3	Griffith	Cannabis: 0.6, 0.6, 0.6, 0.6, 0.7, 0.8, 1.2, 1.6, 2.3, 5.5, 7.5, 9.4 Amphetamine: 0.2, 0.8, 0.9, 1.3	7	Possess prohibited drug: 10	Fine: \$300, \$300, \$300, \$300, \$300, \$350, \$400, \$400, \$400, \$400
				Possession of equipment for administering prohibited drug: 3	Fine: \$200, \$300, \$300
				Drive while under the influence of drugs: 1	Fine: \$600
4	Lachlan	Cannabis: 0.1, 1.5, 2.4, 2.93, 7.4, 42.0	3	Possess prohibited drug: 3	Section 10 dismissal: 2 Fine: \$150
5	New England	Cannabis: <1.0, 1.0, 2.0	2	Possess prohibited drug: 1	Fine: \$300
				Possession of equipment for administering prohibited drug: 1	Fine: \$300
6	Deniliquin	Cannabis: 1.0, 1.0	2	Nil	N/A
7	Monaro	Cannabis: 1.0, 1.0, 5.0, 6.0, 7.0, 10.0, 10.0, 10.0, 13.0, 3.0, 14.0, 14.0, 14.9, 15.0, 24.0, 24.0, 36.0, 57.0 Cocaine: <1.0	11	Possess prohibited drug: 8	Section 10 dismissal (with bond): 3 Fine: \$200, \$250, \$300, \$300, \$500
8	Cootamundra	Cannabis: 1.0, 1.0, 16.0	1	Possess prohibited drug: 2	Fine: \$200, \$500
9	Orana	Cannabis: 0.9, 2.6, 3.5, 10.6, 31.9	3	Possess prohibited drug: 2	Fine: \$750 Charges yet to be determined at court: 1

	Local area command/s where operation conducted	Drugs seized <i>(Gross weight in grams)</i> ⁹¹	No. of cannabis cautions issued	No. of drug-related charges	Court outcomes ⁹²
10	Lower Hunter	Cannabis: 0.01, 0.1, 0.1, 0.4, 1.0, 2.0, 3.65, 10.6, 22.3 ⁹³ , 426.0 Amphetamine: 1.89 Ecstasy: 1 tablet (0.25) ⁹⁵	4	Possess prohibited drug: 5	Section 10 dismissal: 1 ⁹⁴ Fine: \$150, \$200, \$200, \$200
				Possession of equipment for administering prohibited drug: 1	Section 10 dismissal: 1
				Supply prohibited drug: 2	Fine: \$1000 (plus two-year section 9 good behaviour bond), \$2000 (plus a six-month suspended gaol sentence)
11	Darling River	Cannabis: 3.0 6.0, 10.0, 10.0, 14.0, 21.8 Amphetamine 0.3, 1.5 Ecstasy: 2.0 ⁹⁶	5	Possess prohibited drug: 4	Fine: \$200 Charges yet to be determined at court: 3
12	Chifley	Cannabis: 10.0, 10.0	2	Nil	N/A
13	Wagga Wagga, Albury	Nil	0	Nil	N/A
14	Tweed/Byron	Cannabis: 0.6, 1.0, 3.0 Amphetamine: 11.0*	3	Possess prohibited drug: 1 ⁹⁷	Charges yet to be determined at court: 1
				Supply prohibited drug: 1	Charges yet to be determined at court: 1
15	Goulburn	Cannabis: 1.4	0	Possess prohibited drug: 1	Fine: \$200
16	Monaro	Cannabis: 1.0, 1.0, 1.0, 2.0, 10.0, 227.8 Ecstasy: 0.1	4	Possess prohibited drug: 3	Fine: \$500, \$700 Charges yet to be determined at court: 1
17	Deniliquin	Nil	0	Nil	N/A
18	Griffith	Cannabis: 2.0	1	Nil	N/A
19	Barrier	Cannabis: 1.0, 2.0	2	Nil	N/A
20	Lachlan	Cannabis: 3.0	0	Possess prohibited drug: 1	Fine: \$150

	Local area command/s where operation conducted	Drugs seized (Gross weight in grams) ⁹¹	No. of cannabis cautions issued	No. of drug-related charges	Court outcomes ⁹²
21	Monaro	Cannabis: 0.1, 0.3, 1.1, 1.2, 1.7, 1.9, 2.0, 2.3, 2.5, 2.5, 2.8, 2.8, 3.0, 3.9, 4.2, 4.5, 4.6, 5.7, 6.3, 6.4, 6.4, 6.9, 7.2, 7.5, 8.5, 12.7, 18.0, 23.6 Amphetamine: 0.8, 1.3, 1.3, 2.89, 3.4 Ecstasy: 1 tablet (0.25), 0.5 (1 tablet), 0.7 ⁹⁸ , 1.0 (20 tablets), 10.7 (40 tablets)* Cocaine: 1.1, 3.1, 6.74* Nexus: 1.39*	21	Possess prohibited drug: 17	Section 10 dismissal (with bond): 6 Fine: \$75, \$200, \$200, \$200, \$200, \$200, \$400, \$500, \$500, \$500
				Supply prohibited drug: 1	Charges yet to be determined at court: 1
				Supply prohibited drug > small and <= indictable quantity: 1	Four months imprisonment ⁹⁹
				Supply prohibited drug > indictable quantity (not cannabis): 3 ¹⁰⁰	Charges yet to be determined at court: 3
22	Canobolas	Cannabis: 0.5, 1.5 Amphetamine: 4.5	2	Possess prohibited drug: 1	Section 9 bond (12 months)
				Supply prohibited drug: 1	Withdrawn ¹⁰¹
23	Barrier	Cannabis: 1.5, 2.7, 10.0, 36.0 Amphetamine: 9.5*, 12.5*	1	Possess prohibited drug: 5 ¹⁰²	Fine: \$150 Charges yet to be determined at court: 4
				Supply prohibited drug > indictable quantity (not cannabis): 2	Charges yet to be determined at court: 2

Source: NSWPF, COPS, Court transcripts.

* Indicates indictable quantity.

3.4. Summary of results for the drug detection trial

During the one-year review period police conducted 23 operations on 52 days involving 624 officers and 48 drug detection dogs, including 2 dogs from the Australian Customs Service.¹⁰³

A total of 7,527 vehicles were stopped and screened by drug detection dogs.

A total of 591 vehicles (8% of all vehicles stopped) and 537 persons were searched.

One or more drugs were located in 2% (133 of 7,527) of all vehicles stopped.

The rate of finding drugs after an indication by a drug detection dog was 23% (133 of 591).

The rate of finding indictable quantities of drugs in all vehicles stopped was 0.04% (3 of 7,527).

The rate of finding indictable quantities of drugs in vehicles where one or more drugs were located was 2.3% (3 of 133).

3.4.1. Drugs seized

Seven indictable quantities of drugs were seized as a result of the 23 operations conducted. Six of the seven seizures resulted from searches on three vehicles and/or their occupants. The seventh indictable amount seized was located alongside a garbage bin near a check point.

No indictable quantities of cannabis were seized. However, indictable quantities of amphetamine (9.0g, 9.5g, 11.0g, and 12.5g), ecstasy (10.7g (40 tablets)), cocaine (6.74g), and nexus (1.39g) were seized.

The most commonly seized drug was cannabis (123 occasions). A total of 1490.39 grams of cannabis was seized, which, if found on a single occasion, would amount to an indictable quantity of cannabis. The median cannabis seizure was 3.0 grams, which is one-tenth of the prescribed small quantity of cannabis (30 grams). Seven cannabis seizures (6%) were greater than the prescribed small quantity (31.9g, 36.0g, 36.0g, 42.0g, 57.0g, 227.8g, and 426.0g). The largest single seizure of cannabis was 426.0 grams.

The next most commonly seized drug was amphetamine (19 occasions). A total of 68.08 grams of amphetamine was seized. The median amphetamine seizure was 1.5 grams. The largest single seizure of amphetamine was 12.5 grams. Four of the 19 seizures of amphetamine were initially considered to be of an indictable quantity.

A total of 15.5 grams of ecstasy was seized (8 occasions). The median ecstasy seizure was 0.6 grams. The largest single seizure of ecstasy was 10.7 grams (40 tablets), the only indictable quantity detected.

A total of 11.94 grams of cocaine was seized (4 occasions). The median cocaine seizure was 2.1 grams. The largest single seizure of cocaine was 6.74 grams, the only indictable quantity detected.

An indictable quantity of nexus (1.39 grams) was seized on the only occasion the drug was detected.

A small amount of white powder suspected of being heroin was seized. However, this was not analysed as it was inadvertently destroyed.

A number of cannabis smoking implements such as bongs and pipes were also seized.

3.4.2. Legal actions

The most common legal action resulting from drug seizures was the issue of a cannabis caution (78 occasions), which demonstrates that police exercised appropriate discretion when detecting persons found with small amounts of cannabis.¹⁰⁴

A total of 60 persons were charged with drug-related offences including:

- possess prohibited drug¹⁰⁵ (70 charges)
- possession of equipment for administering prohibited drugs¹⁰⁶ (9 charges)
- drive while under the influence of drugs¹⁰⁷ (1 charge)
- supply prohibited drug¹⁰⁸ (5 charges)
- supply prohibited drug > small and <= indictable quantity¹⁰⁹ (1 charge), and
- supply prohibited drugs > indictable quantity (not cannabis)¹¹⁰ (5 charges).

A number of other non drug-related charges were also laid including:

- drive with low/mid/high/special range PCA¹¹¹ — commonly known as 'drink driving' (12 charges)
- never licensed person drive vehicle on road
- drive while disqualified from holding a licence
- drive while licence suspended
- unlicensed driver for class
- use unregistered registrable Class B or C motor vehicle
- possess unregistered firearm-pistol
- possess unauthorised pistol
- possess ammunition without holding licence/permit
- custody of knife in a public place
- goods in custody suspected of being stolen
- receive stolen goods, and
- deal with property suspected of being proceeds of crime.

One person was charged with resist/hinder police officer in the execution of duty and fail/refuse to comply with request by police officer. However, these charges were withdrawn at court due to incorrect charges being laid and insufficient evidence in the brief.¹¹²

In addition, police issued more than 112 traffic infringement notices.

No charges were laid during the review period under section 16 of the Drug Detection Trial Act, which relates to offences for obstructing or hindering persons exercising functions under an authorisation, and failing or refusing, without reasonable excuse, to stop a vehicle or comply with other directions by police officers exercising functions under an authorisation.¹¹³

3.4.3. Court outcomes for drug-related charges

3.4.3.1. Possess prohibited drug

Of the 70 charges laid, 60 have been determined at court. Of the remaining 10 charges, 3 are supply charge back-ups — that is, they will be withdrawn if the supply charge is proven.

Twelve charges were dismissed without proceeding to conviction pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999*. Nine dismissals involved good behaviour bonds ranging from 6 months to 2 years.¹¹⁴

One charge resulted in the person receiving a 12-month section 9 bond to be of good behaviour.¹¹⁵

The remaining 47 charges resulted in fines ranging from \$75 to \$750. The average fine was \$311.

3.4.3.2. Possession of equipment for administering prohibited drugs

Of the nine charges laid, one was dismissed without proceeding to conviction. The remaining eight charges resulted in fines ranging from \$80 to \$300. The average fine was \$150.

3.4.3.3. Drive while under the influence of drugs

The one charge laid resulted in a \$600 fine and a six-month disqualification from driving.¹¹⁶

3.4.3.4. Supply prohibited drug

Of the four charges laid, two have been determined at court. One resulted in a \$1000 fine and a two-year section 9 bond to be of good behaviour. The other resulted in a \$2000 fine and a suspended six-month suspended gaol sentence.

Another supply charge was withdrawn with the person being convicted of possess prohibited drug and receiving a 12-month section 9 bond. At the time of finalising this report, the fourth charge had not been determined at court.

3.4.3.5. Supply prohibited drug > small and <= indictable quantity

The one charge laid resulted in the person being sentenced to four months gaol. However, an appeal on the severity of the sentence has been lodged. At the time of finalising this report, the appeal had not been determined.

3.4.3.6. Supply prohibited drugs > indictable quantity (not cannabis)

None of the five charges has been determined at court.

3.5. Persons found with prohibited drugs during operations

3.5.1. 'Minor possession'

As noted above (at paragraphs 3.4.1 and 3.4.2), the majority of people detected with prohibited drugs during operations were found in possession of mostly small amounts of cannabis.

In addition, the majority of people detected with drugs had little or no previous contact with the criminal justice system as evidenced by the fact that:

- police issued cannabis cautions to almost two-thirds (78 of 123) of persons detected with cannabis, and
- almost one-fifth (13 of 69) of the possess prohibited drug and possess equipment for administering prohibited drug charges resulted in a section 10 dismissal at court.

3.5.2. Possession for supply purposes

A total of seven persons were charged with supply prohibited drug offences. Four of the seven persons were found with indictable quantities of drugs. Below is a brief description of the circumstances surrounding the supply charges and court outcomes (where known).¹¹⁷

1. A 58-year-old male driver of a station wagon was found in possession of four plastic bags containing a total of 426 grams of cannabis. He admitted to purchasing the cannabis for his girlfriend and a mutual friend. He also admitted that he was on his way to deliver the cannabis to his girlfriend. The man, who had no prior convictions, pleaded guilty to supply prohibited drug and was sentenced to six months goal, which was suspended on the condition that he be of good behaviour during that period.¹¹⁸ In addition, he was fined \$2000. It is worth noting that, before being sentenced, the man completed the MERIT¹¹⁹ program, which aims to address drug use problems.¹²⁰
2. The knapsack of a 22-year-old female passenger travelling in a sedan was found to contain 20 small individual bags containing a total of 22.3 grams of cannabis. The woman told police that she was a first year apprentice and that she had just started selling cannabis for extra cash. The woman, who had no prior convictions, pleaded guilty and received a section 9 bond to be of good behaviour for two years. In addition, she was fined \$1000.¹²¹
3. A 40-year-old male driver of an unregistered prime mover was found in possession of 5.4 grams of amphetamine and some other tablets, which he stated were dexamphetamine and Chinese medicine to assist him to stay awake. A further 5.6 grams of amphetamine was located in the cabin of the vehicle, which the man denied any knowledge of. The man said that the 5.4 grams of 'speed' was for his personal use and would last for up to a month. The man, who has no prior convictions, was charged with supply prohibited drug in relation to the indictable amount of amphetamine (11.0 grams total). Police sent the other tablets to be analysed to determine if they contained any prohibited drugs. At the time of finalising this report, the supply charge had not been determined at court.¹²²
4. A 28-year-old male, who was a passenger in a hatch back with friends travelling to Canberra to attend the *Summernats* festival, was found in possession of 3.1 grams of cocaine, 12.7 grams of cannabis, and 20 ecstasy tablets weighing a total of 1.0 gram. The man, who had no prior convictions, pleaded guilty to two counts of possess prohibited drug (in relation to the cannabis and cocaine) and received fines of \$200 and \$500 respectively. In relation to the supply ecstasy charge,¹²³ the man pleaded guilty and was sentenced to four months imprisonment. An appeal on the severity of this sentenced has been lodged. At the time of finalising this report, the appeal had not been determined.¹²⁴
5. A 25-year-old male driver of a goods van was found in possession of a number of resealable plastic bags containing: 40 ecstasy tablets with a net weight of 10.7 grams; a tablet and fragments of a drug colloquially known as 'nexus' with a net weight of 1.39 grams; cocaine with a net weight of 6.74 grams; and methylamphetamine with a net weight 2.89 grams.¹²⁵ In addition, police seized cash and a number of items of property suspected of being stolen. The man was charged with three counts of supply prohibited drug in relation to the indictable amounts of ecstasy, nexus, and cocaine. He was also charged with supply prohibited drug for the methylamphetamine seized. At the time of finalising this report, the charges had not been determined at court.¹²⁶
6. A 45-year-old male driver of a station wagon was found in possession of 9.5 grams of amphetamine and 36.0 grams of cannabis. The man also had a set of scales and a number of small resealable plastic bags. The man stated the drugs were for his own personal use. He was charged with supply prohibited drug in relation to the indictable amount of amphetamine, and possess prohibited drug for the cannabis. At the time of finalising this report, the charges had not been determined at court.¹²⁷
7. A 42-year-old male passenger of the station wagon in case 6 above was found in possession of 12.5 grams of amphetamine and 10 grams of cannabis. The man stated that the drugs were for his own personal use. He was charged with supply prohibited drug in relation to the indictable amount of amphetamine, and possess prohibited drug for the cannabis. At the time of finalising this report, the charges had not been determined at court.¹²⁸

3.5.3. Persons found with amphetamine

A total of 18 persons were found in possession of amphetamine during the review period. Of these, five were heavy vehicle drivers including one driver with an indictable amount of 11.0 grams. The remaining 13 persons were travelling in cars as either the driver or passenger including 3 occasions where indictable quantities were seized (9.5, 11.0 and 12.5 grams).

In addition, a driver of a Pantec truck was charged and convicted with drive under the influence of amphetamine and cannabis.¹²⁹ The magistrate made the following comments when sentencing the truck driver:¹³⁰

... one of the things that lives in the mind of the community is that — and with much regret because it probably taints a lot of very straight truck drivers — that too many people drive big vehicles with drugs in their system. And sure, the explanation has always been ‘I need to stay awake to get home’. That is the same explanation that anyone would have used in the circumstances, as I have said, where, regrettably, people on the highway have died as a result of people losing the ability to effectively control a vehicle.

I am always astounded at the number of times that people in your position are found with amphetamines and cannabis. I do not get it ... because my understanding ... is that one has the effect of making you awake, the other has the effect of making you drowsy. At the end of the day why take either of them?

Another magistrate expressed a similar sentiment when sentencing a heavy vehicle driver who was found in possession of amphetamine and cannabis:

We all hear stories, particularly about drivers using amphetamines to stay awake because of the pressures they or their employers place them under ... and there’s a great level of concern obviously about that.

... all I can ask you is that if you are again driving a heavy vehicle ... you remain drug free ... because of the responsibility you have as a driver ... to other road users.¹³¹

3.6. Comparison of drug detection trial with previous border areas trial

3.6.1. Summary of results of the border areas trial

During the nine-month review period police conducted nine operations involving 234 officers. The operations involved four local area commands in Southern Region (Albury, Deniliquin, Griffith and Wagga Wagga) and one in Western Region (Barrier).

A total of 3,809 vehicles were stopped and screened by drug detection dogs.

A total of 291 vehicles (approximately 8% of all vehicles stopped) and 411 persons were searched.

One or more drugs were located in approximately 2% (89 of 3,809) of all vehicles stopped.

The rate of finding drugs after an indication by a drug detection dog was approximately 31% (89 of 291).

Two indictable quantities of drugs were seized (1017 grams of amphetamine (‘ice’) and 2956 grams of cannabis) although no successful prosecutions resulted from the seizure of these drugs.

A total of 4799.81 grams of cannabis and 1025.41 grams of amphetamine were seized during the nine operations.

The most common legal action resulting from the drug seizures was the issue of a cannabis caution.

3.6.2. Commentary on the similarity and differences between the trials

In many respects the border areas and drug detection trials have yielded similar results. For example, the rate of searching vehicles stopped (8%) and the rate of finding drugs in all vehicles stopped (2%) was the same in both trials. Also, indictable quantities of drugs were located in two separate vehicles during the border areas trial, and in three separate vehicles during the drug detection trial.

In addition, the most common legal action in both trials was the issue of a cannabis caution, which demonstrates police seized mostly small amounts of cannabis during the review periods for both trials.

Interestingly, the total amount of drugs seized during the border areas trial was much higher (4799.81 grams of cannabis and 1025.41 grams of amphetamine) than during the drug detection trial (1490.39 grams of cannabis and 68.08 grams of amphetamine). However, it should be noted that amounts of ecstasy (15.5 grams in total), cocaine (11.94 grams in total) and nexus (1.39 grams in total) were also seized during the drug detection trial.

There were no successful prosecutions for drug supply as a result of the border areas trial. As a result of the drug detection trial, two persons have been successfully prosecuted for supply prohibited drug involving 22.3 grams and 426.0 grams of cannabis respectively. A further four persons are facing a total of seven supply charges with six of the charges involving indictable quantities of drugs (9.5, 11.0 and 12.5 grams of amphetamine; 10.7 grams (40 tablets) of ecstasy; 6.74 grams of cocaine; and 1.39 grams of nexus). At the time of finalising this report, these charges had yet to be determined at court.

Endnotes

- ⁸³ This includes cannabis-smoking implements such as bong, pipes etc.
- ⁸⁴ Calculated by dividing the number of occasions where one or more drugs were seized by the number of indications by drug detection dogs that led to a search of a vehicle and/or its occupants. We have endeavoured to exclude searches that were not a result of a drug detection dog indication but conducted for some other reason e.g. the police officer formed a reasonable suspicion that there may be drugs in the vehicle and/or in the possession of occupants independent of an indication.
- ⁸⁵ This drug was located alongside a garbage bin near a check point — no person has been charged in respect of this seizure. NSWPF COPS ref: E29962143.
- ⁸⁶ It appears that this figure may be incorrect given that police did not create 192 COPS events to record all searches. We sought clarification from senior police who conducted the operation. However, at the time of finalising this report, no advice had been received.
- ⁸⁷ Police conducted a further 19 searches that were not based on a drug detection dog indication.
- ⁸⁸ All located on one person.
- ⁸⁹ Located on two separate persons in the same vehicle.
- ⁹⁰ See www.erowid.org (accessed 17 April 2008).
- ⁹¹ Gross weight includes any packaging. For further discussion of the use of gross weights, see paragraph 13.3.3 'Drug packaging' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.167.
- ⁹² In addition to any fines or other penalties, each successfully prosecuted charge incurred \$70 in court costs.
- ⁹³ Net weight of drug seized (gross weight = 33.6g).
- ⁹⁴ Initially fined \$300. However, penalty successfully appealed in the District Court.
- ⁹⁵ We have assumed that 1 tablet = 0.25g. No action taken in respect of this seizure as it involved a young, drug affected person who was directed by police to a local hospital for medical attention.
- ⁹⁶ This represents an indictable amount. However, this drug seizure only resulted in a possess prohibited drug charge, suggesting that the drug packaging contributed significantly to the gross weight.
- ⁹⁷ This is a back-up charge for the supply prohibited drug charge. For further discussion of back-up charges, see paragraph 13.4.4.1 'Back-up possess charge' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.170.
- ⁹⁸ Powder seized believed to be ecstasy.
- ⁹⁹ An appeal on severity has been lodged. At the time of finalising this report, this appeal had not been determined.
- ¹⁰⁰ One person found in possession of three indictable quantities of drugs.
- ¹⁰¹ The supply charge was withdrawn and the person convicted of possess prohibited drug. For further discussion of this issue, see paragraph 13.4.8 'Withdrawal of supply charges' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.172–3.
- ¹⁰² This figure includes two back-up charges for the supply prohibited drug >indictable quantity (not cannabis) charges.
- ¹⁰³ See Table 4 'Operational costs' at paragraph 5.6.1 for a breakdown of the number of officers and dogs at each operation.
- ¹⁰⁴ For a detailed discussion of the Cannabis Cautioning Scheme, including an outline of the eligibility criteria, see paragraph 15.5.1 'Cannabis Cautioning Scheme' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.235–40. We note that police do not have a similar option in relation to persons found in possession of small amounts of drugs other than cannabis. As a result of the review of the *Police Powers (Drug Detection Dogs) Act 2001*, we recommended that 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. The recommendation was supported by the (then) Attorney General, the NSW Police Force and NSW Health. We received recent advice from the Attorney General's Department (email correspondence on 6 February 2008) advising that the department has consulted with police and health portfolios and that "the proposal underlying the recommendation is not being progressed at this time."
- ¹⁰⁵ *Drug Misuse and Trafficking Act 1985*, s.10(1). Maximum penalty (prescribed in s.21) is \$2,200, imprisonment for 2 years, or both.
- ¹⁰⁶ *Drug Misuse and Trafficking Act 1985*, s.11(1). Maximum penalty (prescribed in s.21) is \$2,200, imprisonment for 2 years, or both. It is not an offence to be possession of a syringe or needle (s.11A).
- ¹⁰⁷ *Road Transport (Safety and Traffic Management) Act 1999*, s.12(1). Maximum penalty (for the first offence) is \$2,200, imprisonment for 2 years, or both. A person convicted of this offence may also be disqualified from holding a driver's licence pursuant to Division 3 Part 3 of the *Road Transport (General) Act 1999*.
- ¹⁰⁸ *Drug Misuse and Trafficking Act 1985*, s.25(1). Maximum penalty (prescribed in s.30(3)) is \$5,500, imprisonment for 2 years, or both where the matter is dealt with summarily (in the Local Court).
- ¹⁰⁹ *Drug Misuse and Trafficking Act 1985*, s.25(1). Maximum penalty (prescribed in s.31(3)) is \$11,000, imprisonment for 2 years, or both where the matter is dealt with summarily (in the Local Court).
- ¹¹⁰ *Drug Misuse and Trafficking Act 1985*, s.25(1). Maximum penalty (prescribed in s.32(g)) is \$220,000, imprisonment for 15 years, or both. Charges of this serious nature are dealt with on indictment (usually in the District or Supreme Court) and not summarily (in the Local Court).
- ¹¹¹ Prescribed Concentration of Alcohol.
- ¹¹² See case study 10 (at paragraph 4.5).
- ¹¹³ Advice from the NSW Police Force, 14 March 2008.
- ¹¹⁴ For further discussion of section 10 dismissals, see paragraph 4.7.1.2 'Dismissal and conditional discharge' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.34–5. See also paragraph 13.6.6 'Dismissal of charge and conditional discharge (without proceeding to a conviction)' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.181.
- ¹¹⁵ *Crimes (Sentencing Procedure) Act 1999*, s.9.
- ¹¹⁶ See case study 12 (at paragraph 4.7.3) for further details of this incident.
- ¹¹⁷ Please note, the information is from the NSW Police Force version of events contained in the COPS Event narratives.

¹¹⁸ Pursuant to s.12 of the *Crimes (Sentencing Procedure) Act 1999*.

¹¹⁹ Magistrates Early Referral Into Treatment. For further details about the MERIT program, see: <http://www.lawlink.nsw.gov.au/merit> (accessed on 11 March 2008).

¹²⁰ NSWPF COPS ref: E31323738; H31487450.

¹²¹ NSWPF COPS ref: E312247334; H105373197.

¹²² NSWPF COPS ref: E32298218; H62564601.

¹²³ The supply charge was based on the deeming provision in section 29 of the *Drug Misuse and Trafficking Act 1985*, which deems a person to be in possession of a drug for the purposes of supply unless the accused can prove (on the balance of probabilities) that the drug was in his or her possession otherwise than for supply. For further discussion of deemed supply charges, see paragraph 13.3.1 'Deeming provision' and paragraph 13.3.4 'Proving supply' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.166–7.

¹²⁴ NSWPF COPS ref: E32460364; H32702219.

¹²⁵ Net weights obtained from Division of Analytical Laboratories Analyst's Certificate, Register No. D2800286, 6 February 2008.

¹²⁶ NSWPF COPS ref: E32509734; H34422480.

¹²⁷ NSWPF COPS ref E33121362; H33320128.

¹²⁸ NSWPF COPS ref: E33121362; H33120804.

¹²⁹ See Case Study 12 at paragraph 4.7.3 for further details of this incident.

¹³⁰ *Police v Michael Newell* (Hogg LCM, Unreported, Griffith Local Court, 16 January 2008).

¹³¹ *Police v Geoffrey John Morley* (Crews LCM, Unreported, Raymond Terrace Local Court, 24 September 2007).

Chapter 4.

Issues identified during the drug detection trial

This chapter outlines various police practices observed during the review period. It contains an examination of the process for granting authorisations to conduct operations and a discussion of some of the legal issues raised during the drug detection trial.

4.1. Authorisation to conduct drug detection operations

As noted above (at paragraph 2.2), the revived Drug Detection Trial Act changed the way in which police obtain approval to conduct drug detection operations. A police officer now applies to a designated officer, who is a senior NSW Police Force officer, for an authorisation to conduct an operation. One consequence of this change is that the material used to justify the conduct of an operation is not subject to any external scrutiny. Accordingly, we decided to examine the authorisation process adopted by, and the intelligence material presented to designated officers for the 23 operations conducted during the review period.

4.1.1. Application for authorisation to conduct drug detection operations

Section 6 of the Drug Detection Trial Act provides:

- (1) A police officer who suspects on reasonable grounds that any part or all of an area is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs or prohibited plants may apply to a designated officer for an authorisation.*
- (2) An application for an authorisation is to be made in writing and contain the following particulars:*
 - (a) a statement identifying the search area for the proposed authorisation,*
 - (b) the grounds on which the authorisation is sought,*
 - (c) a plan of the operation proposed to be carried out, including the number of officers and dogs proposed to be used,*
 - (d) a statement setting out the consultation that has taken place with the Roads and Traffic Authority,*
 - (e) a statement as to whether the proposed search area has been the subject of any other application for an authorisation within the last 12 months and, if so, whether the application was granted,*
 - (f) a statement outlining the results of any operation carried out pursuant to an authorisation in the proposed search area within the last 12 months,*
 - (g) the proposed expiry date for the authorisation,*
 - (h) any other particulars prescribed by the regulations.¹³²*
- (3) The designated officer to whom the application is made may require the applicant to provide such additional information concerning the application as is necessary for the designated officer's proper consideration of the application.*

The information required to be furnished in an application for authorisation is almost identical to that required under the Border Areas Trial Act.¹³³ In addition, section 6(2)(f) of the Drug Detection Trial Act requires the applicant to outline the results of drug detection operations in the preceding 12 months and section 6(3) gives the designated officer the power to require the applicant to provide further information necessary for the designated officer's proper consideration of the application.

4.1.1.1. Police views on the authorisation process

The NSW Police Force believes the change from having a Supreme Court judge grant a drug detection warrant to conduct an operation to a NSW Police Force designated officer granting an authorisation to conduct an operation is a beneficial one.¹³⁴

One senior officer we interviewed suggested that the shift from external scrutiny (by a judge) of the material used to support the application to internal scrutiny (by a designated officer) was appropriate and in line with the practice of authorising controlled operations.¹³⁵

A number of senior officers opined that the authorisation process is still onerous:

Getting an authorisation is a lengthy and time consuming process [requiring a lot of work] and then you need to plan your staff and all that.¹³⁶

... there was a lot of stuff we had to do to get it up and running. Had to deal with the RTA, get the site approved to start with, different sections of the police, the mapping unit, legal advice to help us prepare the application for the Commissioner, different OH&S issues, WorkCover, making sure everything's done properly.¹³⁷

The planning phase was an enormous task for the local area commands.¹³⁸

... you wouldn't get an authorisation through if you started cold from today for tomorrow.¹³⁹

The Police Association of NSW also expressed strong views about the requirements in section 6:¹⁴⁰

The extensive information required to be completed by police for all applications for authorisation are extremely resource intensive for intelligence officers. ...

Our members strongly believe that the requirements as outlined in Section 6 of the [Drug Detection Trial] Act are onerous and extremely time consuming. Police are being taken away from performing other core duties in order to satisfy legislative requirements in their preparation of applications for authorisations. It is little wonder then that it can take at least a week or longer for police to prepare the documents required for an authorisation. Intelligence gathering can take an even considerably longer period of time in order to meet all the requirements as set out in the [Drug Detection Trial] Act.

In relation to the amount of resources required to collate the information required for an authorisation, one senior officer acknowledged that it was time consuming but suggested that the way information is recorded and stored on the 'unruly' COPS system complicated the task.¹⁴¹

Another senior officer we interviewed noted that one of the challenges for Western Region was establishing the intelligence basis to conduct operations. The officer noted that Western Region had not had substantial numbers of indictable seizures.¹⁴²

4.1.1.2. Application for authorisation practice adopted by police

The SOPs for the drug detection trial contain a template application for authorisation which guides applicants through the process of preparing an application.¹⁴³ After an officer has prepared an application — usually with the support of region intelligence analysts given the need to source generic intelligence for large geographical areas — it is sent to Legal Services who ensure that the application meets the legislative requirements. One senior officer told us the reason applications for authorisation were sent to Legal Services was because:

... any type of operation where ... there's a legal document we send to Legal Services to ensure that everything is right because the last thing that you'd want to do is get a significant detection and then realise that you haven't done everything ... they [Legal Services] read it from a different perspective as well.¹⁴⁴

After Legal Services have confirmed that the application meets the legal requirements, the applicant forwards the application to the Region Operations Manager who vets it and forwards it to the designated officer — normally the Region Commander for the region of the proposed operation — for approval.¹⁴⁵ We understand that police did not proceed with three proposed operations after review by Legal Services.

4.1.1.3. Examination of applications for authorisation

Our examination of the 23 applications for authorisation revealed a high degree of compliance with the section 6 requirements. The template in the SOPs, and the review by Legal Services, appeared to have contributed to the consistent compliance with the legislative requirements.

Four applications for authorisation referred to the results of previous operations. On one occasion, the application for authorisation to conduct a mobile operation referred to a previous static operation during which 215 vehicles were stopped and five vehicles searched with police locating two grams of cannabis and a smoking utensil. The subsequent mobile operation involving 12 police and 2 drug detection dogs over two days resulted in 66 vehicles being stopped with police searching one vehicle. No drugs were seized.

On another occasion, the application for authorisation to conduct a mobile operation referred to a previous static operation in which 'there were no significant detections'. The application also stated:

Police believe that a reason for [there being no significant detections] was that the previous authorisation was in relation to one static location within the authorised areas. Police believe that vehicles were able to use alternative routes around the static locations to avoid being detected. Police will be conducting mobile patrols in relation to the above authorised areas during this operation to negate this.¹⁴⁶

The designated officer who granted the authorisation, which resulted in the seizure of 3.0 grams of cannabis, did not make any reference to the results of the previous operation when granting the authorisation.

We found one application that did not appear to have complied with the section 6(2)(d) RTA consultation requirement. We were not provided with the statement setting out the consultation with RTA. In addition, Legal Services also noted that there did not appear to be a statement setting out the consultation with the RTA and advised the applicant to ensure that it be provided to the designated officer at the time the application is considered. We were unable to determine whether a statement setting out the consultation with the RTA formed part of the application considered by the designated officer.

However, we note that section 15A of the Drug Detection Trial Act provides:

An application for an authorisation, and any authorisation granted on the basis of such an application, is not invalidated by any procedural defect, other than a defect that affects the substance of the application or authorisation in a material particular.

In our view, the lack of a statement outlining the consultation with the RTA, which is not necessarily indicative of a failure to consult with the RTA, is not a material particular likely to invalidate the authorisation. In addition, we note that the operation was conducted at a truck stop utilised by RTA inspectors.

4.1.1.4. Types of intelligence material contained in applications for authorisation

The majority of applications for authorisation contained a wide variety of credible intelligence material. Most applications for authorisation contained the following format:

- **Background** — containing general information about the highways in and around the proposed search area.
- **Supporting seizures** — containing details of COPS events and charges for seizures of indictable quantities of drugs. Many applications also contained details of smaller seizures of drugs.
- **Supporting intelligence** — containing details of COPS information reports and intelligence material from other NSW Police Force specialist units such as the Drug Squad, Asian Crime Squad and the Middle Eastern Organised Crime Squad; and from other law enforcement agencies across Australia such as interstate police forces and crime commissions.

In addition, applications for authorisation also included the following:

- intelligence briefings (usually prepared by intelligence analysts attached to the regions or specialist units such as the Asian Crime Squad)
- information about drug couriers gathered during controlled operations
- information obtained as a result of various police strike forces aimed at drug trafficking and supply
- intelligence material obtained through electronic surveillance such as telephone intercepts and listening devices
- information provided by registered community sources
- intelligence bulletins from various law enforcement agencies, and
- intelligence material about specific targets (both individuals and transport companies).

4.1.2. Grant of authorisation by designated officer to conduct drug detection operations

Section 8 of the Drug Detection Trial Act provides:

(1) A designated officer to whom an application for an authorisation is made may grant the authorisation only if satisfied that:

(a) there are reasonable grounds for suspecting that any part or all of the search area proposed for the authorisation is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs or prohibited plants, and

(b) the nature and extent of the operation proposed to be carried out is appropriate to the suspected criminal activity, and

(c) the application has been made in accordance with this Part, and

(d) the proposed search area complies with this Part.

(2) In considering the matters referred to in subsection (1)(a) and (b), the designated officer is to have regard to the following:

(a) the reliability of any information on which the application is based,

(b) the likelihood of success of the proposed operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes.

(3) The authorisation may be granted unconditionally or subject to conditions.

(4) An authorisation is to be in the form (if any) prescribed by the regulations.

(5) If a designated officer grants an authorisation, the designated officer is to make a record of the reasons for which the designated officer was satisfied of the matters referred to subsection (1)(a) and (b).

(6) If an application for an authorisation is refused by a designated officer, the police officer who made the application (and any other police officer who is aware of the application) may not make a further application for the same authorisation to that designated officer or any other designated officer unless the further application provides additional information that justifies the making of a further application.

Section 14 of the Drug Detection Trial Act provides:

(1) An authorisation has effect, unless sooner revoked, during the period beginning at the time it is given and ending at a time specified in the authorisation by the designated officer who grants the authorisation.

(2) The period during which an authorisation has effect must not exceed 14 days, beginning with the day on which it is granted.

(3) An authorisation cannot be extended but a further authorisation may be granted for the same or part of the same area.

4.1.2.1. Grant of authorisation practice adopted by designated officers

The region operations managers were responsible for placing applications for authorisation before the designated officer. The region commander for the region where the operation was conducted considered and determined the applications for authorisation.

The SOPs for the drug detection trial contain a template authorisation which alerted the designated officer to the matters that she or he must be satisfied of, and the factors to be considered when granting an authorisation.¹⁴⁷

4.1.2.2. Examination of authorisations granted by a designated officer

A total of six designated officers — all of whom were region or acting region commanders of the rank of Assistant Commissioner — granted the 23 authorisations during the review period. Our examination of the authorisations granted revealed a high degree of compliance with the section 8 requirements.

Section 8(5) requires the designated officer to make a record of the reasons for being satisfied in order to grant the authorisation. Without exception, the only record provided to us was the authorisation, which generally disclosed the designated officer's reasons for reaching the requisite satisfaction in relation to:

- the reasonable grounds to suspect the search area is, or is being used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs (pursuant to section 8(1)(a)), and
- whether the nature and extent of the proposed operation is appropriate to the suspected criminal activity (pursuant to section 8(1)(b)).

However, the authorisations rarely documented *how* the designated officers had regard to the reliability of the information and the likelihood of success of the proposed operation compared with the likelihood of success of any other law enforcement operation that would be reasonably practicable to conduct for the same purposes. The usual practice was to state that the matters had been considered without further elaboration.¹⁴⁸

Two authorisations were subject to conditions. One authorisation contained what appeared to be legal advice as a condition (see paragraph 4.2.2 below), and another specifically excluded a search area listed in the application for authorisation.

One quarter of the authorisations (6 of 23) were granted for the full 14 days including one granted for 16 days and another for 18 days despite the fact that section 14(2) provides that the duration of an authorisation must not exceed 14 days. The fact that a majority of the authorisations were granted for less than 14 days was a little surprising given that operations conducted over a longer period of time are likely to be more flexible and involve a greater 'element of surprise'.¹⁴⁹

In our view, the police practice of conducting operations for one, two or three consecutive days limited the opportunity for more flexible operations. For example, the practice appears to have precluded operations conducted in small bursts over a two-week period which may have kept drug couriers guessing. In addition, the practice appears to have restricted police from effectively responding to intelligence information about drug couriers waiting out operations and re-commencing their journeys at the conclusion of operations.

However, as noted below (at paragraph 5.5.6), police in regional areas are restricted by the availability of drug detection dogs that are generally not deployed for more than a few days at a time. We also note that Legal Services provided advice to an applicant on at least one occasion suggesting that a designated officer may not look favourably upon a proposed expiry date beyond the date that the operation was planned to run.¹⁵⁰

4.1.3. Discussion of material used to support the conduct of operations

Our examination of the material contained in the applications for authorisation revealed that the majority of applications contained sufficient evidence of previous seizures and intelligence information to satisfy the grant of an authorisation by the designated officer.

However, we identified some issues which led us to question, on occasion, whether the designated officer had sufficient material to meet the legislative requirements for the grant of the authorisation.

4.1.3.1. Threshold test

The threshold test for the grant of an authorisation is that all or part of the proposed search area is being, or is to be used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs.

During the parliamentary debate on the bill introducing the border areas trial, the Minister for Justice stated:¹⁵¹

This test permits police to adduce information relating to drug dealing in the past or in the future. For instance, police could use a telecommunications interception stating that a quantity of drugs is to be moved in the future but not stating precisely the vehicle or the time. The term "regular" is not defined in the bill. It has its ordinary meaning and case law will build up over time indicating what type of frequency of drug trafficking must be shown.

The term "in connection with the supply of drugs" broadens the test beyond evidence of actual drug seizures. It would permit, for instance, police to adduce evidence of persons who had been picked up carrying large amounts of cash ...

Police will not be able to adduce evidence of minor seizures of drugs possessed for personal use. The legislation is specifically aimed at detecting the trafficking of indictable quantities of prohibited drugs, not offences of minor possession.

The first question that arises is the age of material used to establish whether the proposed search area is being, or is to be used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs. A number of applications contained material spanning the last five years. On the one hand, it could be argued that such material establishes a regular pattern of drug trafficking. On the other hand, the legislation appears to focus on the present and future with the words 'is being, or is to be'. In our view, a wide interpretation of the term is appropriate so as not to defeat the intent of the legislation, which is to enable police to utilise generic or generalised information about patterns of drug trafficking as the basis for conducting drug detection operations.

The second question that arises is what material is relevant to the determination of the threshold question. It is clear that material need not be confined to actual drug seizures. But where evidence of seizures is adduced, should there be some nexus with the vehicular trafficking of drugs? In addition, what weight, if any, should be afforded to evidence of minor seizures of drugs? In our view, evidence of minor seizures of drugs should be afforded little or no weight given the comments of the Minister for Justice extracted above. However, the weight to be afforded to the context of the seizure is less clear.

The complexity of the above questions is demonstrated by case study 1.

The case study illustrates the challenging task confronting designated officers when granting authorisations. On the one hand, most of the assertions made in the application appear to be reasonable and plausible. On the other hand, some of the evidence is not directly referable to the search area or the local area command.

Case study 1

Grant of authorisation¹⁵²

A police officer attached to a local area command in Western Region submitted an application for authorisation containing four annexures. The first annexure contained background material including a statement that the Western Region spans in excess of 65% of NSW. The annexure also contained various maps illustrating the highways in and around the proposed search areas. Under the heading 'Indictable Seizures Western Region', reference was made to the fact that *'no large scale clandestine drug laboratories have been identified in Western Region during the last five years, which provides a reasonable suspicion that the vast majority of amphetamine seized has been transported into the region by road.'*

The second annexure contained a map indicating all of the major highways within the Western Region.

The third annexure contained a table of indictable seizures dating back to 2002 for local commands in Western Region. The table summarised the number of incidents and the amount of drugs seized in each local area command. The table does not make clear how and where the seizures took place. The table shows that in 2007, eight indictable quantities of amphetamine and one indictable quantity of ecstasy were seized in the local area command applying for the authorisation to conduct the operation.

The fourth annexure contains an 'Indictable Seizure Summary' with a number of COPS events from across the region in summary form. Two events relate to the local area command applying for the authorisation. One of the events refers to an operation in 2002 which uncovered a cannabis plantation resulting in the seizure of 208 plants, 1.839 kilograms of cannabis leaf/heads, and 97.54 grams of cannabis seed. The other event refers to the execution of a search warrant in 2005 on private premises resulting in the seizure of 8.383 kilograms of cannabis.

The application did not contain any specific intelligence material such as COPS information reports.

The designated officer granted the authorisation noting that the application *'highlights the detection of significant amounts of indictable quantities of prohibited drugs throughout the Western Region. Further information contained within this application suggests the majority of the prohibited drugs are being transported via major roads and highways.'*

The designated officer also noted that *'within [name of local area command] during 1 January 2002 and 30 October 2007 there were 35 occasions where police detected indictable quantities of prohibited drugs ...'* and that *'three major highways directly interconnect with the [name of command] being [name of highways]. These three highways link directly into the two areas identified within the proposed authorisation areas.'*

The above application notes that Western Region covers 65% of the state, so adducing evidence of seizures across the region, without any reference to the context of the seizures, may not be sufficient to satisfy the threshold test. In our view, consideration of the likely success of the operation, as required by section 8(2)(b), would seem to necessitate at least some consideration of the timing and location of the operation. We note that there is no intelligence in the application related to these issues, and nor does there appear, on the face of the material presented to the designated officer, any intelligence directly related to the vehicular transportation of prohibited drugs.

However, the use of generalised material to support an application for authorisation may permit inferential reasoning given that the threshold test is arguably quite broad. A number of applications and authorisations contained what may be described as reasonable assumptions:

The [name of highway] is a major transport route between Brisbane and Sydney and it is believed that trucks [transporting drugs] will go through our proposed site [name of site].¹⁵³

The applicant has shown that prior to the seizures [outlined in the application], the vehicles had travelled through the nominated authorisation areas.¹⁵⁴

NSW Police [Force] intelligence implicates several heavy vehicle transport companies in the use, supply, and transport of illicit drugs. These vehicles travel the [name of highway] and pass through the sites covered by the authorisation and will be specifically targeted for this operation.¹⁵⁵

It can be speculated that heavy vehicles or drug couriers transporting indictable quantities of drugs will utilise differing routes including [name of highway].¹⁵⁶

In our view, it is appropriate for designated officers to draw inferences from credible information when granting authorisations to conduct operations along major highways given that previous seizures may not have occurred in the proposed search area. That is to say, if there is a demonstrated nexus between a previous seizure or intelligence

material, and the highway that runs through the proposed search area, then this would be a relevant consideration for the designated officer.

What may not be appropriate is the reliance on generalised information as the basis to conduct a cost and resource intensive operation. However, the Drug Detection Trial Act clearly allows for a reliance on general intelligence as the basis for the operation.

4.1.3.2. Additional threshold test

In addition to the above threshold test, section 8(1)(b) imposes an additional threshold test. Namely, the designated officer must be satisfied that the nature and extent of the operation proposed to be carried out is appropriate to the suspected criminal activity.

Our examination of the authorisations granted revealed that this test may not have been explicitly considered by a number of designated officers. For example, in one authorisation granted, the designated officer, after noting that indictable quantities of drugs had been seized on 26 occasions in the last 6 years — approximately one indictable seizure every three months — stated that he was specifically relying on 4 seizures within the last 12 months. Three of these seizures involved vehicle stops where police pulled drivers over for random breath testing (two occasions), or as a result of a radio check (one occasion). Or put another way, police were conducting general duties when stopping these vehicles. The fourth seizure involved the execution of a search warrant at private premises.

The irony of relying on these seizures, as discussed further below (at paragraph 5.9), is that they did not involve a cost and resource intensive drug detection operation, but rather, conventional policing by officers acting on intuition and instinct. Accordingly, it may have been open to the designated officer to question the nature and extent of the proposed operation given the evidence of seizures from alternate, more cost effective policing activities, which was included in most applications for authorisation.

However, we note that police were keen to utilise the trial powers and thus no criticism is intended of the decision to grant the authorisation. Rather, we are simply drawing attention to the fact that the legislation requires the designated officer to consider the appropriateness of the proposed operation and to have regard to the likelihood of success when compared to other operations that may be reasonably practicable to conduct for the same purpose.

In addition, we note that the mobile operation authorised by the designated officer — run over three days with 15 officers and a drug detection dog, at an approximate cost of \$15,000 — resulted in the seizure of two indictable quantities of amphetamine.

4.1.4. Report on the conduct and results of drug detection operations

Section 15B of the Drug Detection Trial provides:

Within 14 days after the expiry of an authorisation, the police officer to whom the authorisation was granted must cause a report to be given to the designated officer who granted the authorisation:

- (a) stating whether or not the operation proposed to be carried out under the authorisation was carried out, and*
- (b) if the operation was carried out — setting out briefly the result of the operation (including a brief description of anything seized), and*
- (c) if the operation was not carried out — setting out briefly the reasons why the operation was not carried out, and*
- (d) containing such other particulars as may be prescribed by the regulations.*

4.1.4.1. Examination of reports on the conduct and results of operation

Our examination of the reports revealed a high degree of compliance with sub-sections 15B(a)–(c). However, based on the copies of reports provided to this office, it appears that only one-third (8 of 23) of the reports were given to the designated officers within 14 days of the expiry of the authorisation. In addition, nine reports contained no acknowledgement of receipt making it unclear whether they were ever sighted by the designated officer who granted the authorisation.

In our view, the lack of compliance with section 15B is of serious concern given that designated officers are required to take into account the results of previous operations when assessing further applications for authorisation. That is to say, if the designated officer is not apprised of the results of previous operations, this may impact upon their capacity to assess whether the nature and extent of any future operations is appropriate. In addition, it may also impact on the designated officer's consideration of the likelihood of success of the proposed drug detection operation.

4.1.5. Capacity of designated officers to grant further authorisations

As noted above (at paragraph 3.4), the rate of finding indictable quantities of prohibited drugs during the 23 operations conducted during the review period has been minimal. In light of this, designated officers may well have reached the point where they are no longer able to lawfully grant further authorisations to conduct operations given their legislative obligation:

- to be satisfied that the nature and extent of the proposed operation is appropriate to the suspected criminal activity, and
- to have regard to the likelihood of success of the proposed operation compared with the success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes.

In our view, it is unlikely that a designated officer, applying the above criteria, could be satisfied that a drug detection operation is the most appropriate law enforcement operation given the demonstrative lack of results to date and the continued success of conventional policing activities during the review period as outlined below (at paragraph 5.9.1).

4.2. Legal issues

During the drug detection trial review period a number of legal issues were identified. These are discussed below.

4.2.1. Where can vehicles be stopped

The Drug Detection Trial Act gives police a new power to stop vehicles for the purpose of conducting general drug detection, which put more simply, involves police screening the outside of vehicles with a drug detection dog.

At a number of operational briefings, Ombudsman observers noted that officers sought clarification of their power to:

- stop vehicles outside the search area¹⁵⁷
- direct vehicles stopped in the search area to a check point, and
- stop vehicles in the search area and either request the attendance of the drug detection dog at the location of the vehicle stop, or direct the vehicle to a check point.

Section 9(1) of the Drug Detection Trial Act provides:

A police officer may, in accordance with an authorisation, exercise any or all of the following functions in respect of the search area and vehicles and persons in the search area:

- (a) establish one or more check points,*
- (b) stop vehicles at a check point,*
- (c) if a vehicle is stopped at a check point or stopped in the search area, use a dog to carry out general drug detection in relation to a person in or on, or seeking to enter or leave, the vehicle or in relation to the vehicle,*
- ...*
- (f) give reasonable directions to facilitate the exercise of any powers under this section to any person in the search area.*

It is reasonably clear that section 9(1) does not give police the power to stop a vehicle outside the search area. However, the precise scope of the power to stop a vehicle within a search area is less clear.

Section 9(1)(c) gives police the power to screen vehicles and persons *stopped* at a check point. To stop and screen a vehicle at a check point, it appears that sub-sections 9(1)(a) and 9(1)(b) require police to first *establish* the check point, and thereafter stop and screen vehicles and persons stopped at the check point.¹⁵⁸

What is required to establish a check point is discussed below (at paragraph 4.2.1.2).

Section 9(1)(c) also gives police the power to screen any vehicles *stopped* in the search area. For example, police appear to be able to screen vehicles and persons stopped at truck stops in the search area. This sensible interpretation, which was adopted by police during the drug detection trial, ensures that vehicles cannot avoid scrutiny by simply stopping before an established check point.

When deciding to screen a vehicle stopped in the search area (as distinct from a vehicle stopped at a check point) police may do one of two things:

- direct the vehicle to move to an established check point for screening, or
- take the drug detection dog to the location where the vehicle is stopped and screen it *in situ* (that is, at its current location).

In our view, a direction to move a vehicle to a check point would be reasonable, and therefore permissible pursuant to section 9(1)(f), as it is required to facilitate the power to screen a vehicle stopped in the search area pursuant to section 9(1)(c).

If police decide to conduct a search of the vehicle after screening it *in situ*, they could search the vehicle there and then, or alternatively, direct it to an established check point for searching.¹⁵⁹ However, there are some risks associated with the practice of directing vehicles to check points as the following case study demonstrates.

Case study 2

Vehicle directed to search location after indication¹⁶⁰

During a mobile operation police stopped a vehicle on a major highway in western NSW. The drug detection dog and handler attended the location where police had stopped the vehicle. The dog indicated the presence of a scent of a prohibited drug to its handler. It appears that police then directed the driver to another location for the purpose of searching. No drugs were located during the subsequent search. The COPS Event narrative contains the following:

It must be noted that the vehicle was directed to attend the search area and as such was not secured for a short period of time. It is highly likely that the person of interest [name of person] did have in his possession prohibited drugs but was able to throw them away when driving to the search area.

While there appears to be little doubt that police have the power to direct a vehicle already stopped in the search area to a check point, the power to stop a vehicle in other parts of the search area and thereafter direct it to a check point is unclear given the power to stop a vehicle in section 9(1) appears to be limited to stopping vehicles at a check point.

The above question highlights some of the inherent challenges faced by police when conducting mobile operations during which 'roving' or 'floating' highway patrol cars are deployed in and around the search area to target vehicles to be stopped. For example, in the above case study it appears that police may not have stopped the vehicle at a check point given the need to direct it to a more suitable location for searching.

4.2.1.1. Mobile operations¹⁶¹

In recognition of the different deployment strategies required to conduct mobile operations, police amended the SOPs for the drug detection trial to include an additional section on mobile operations stating the following:¹⁶²

- The Drug Detection Trial Act gives police the power to stop vehicles at a check point.
- The location of any check points should be established in advance. This involves a prior assessment of each check point to ensure it is safe for vehicle stops, and marking the check points on a map of the search area to be attached to the operational orders.
- A vehicle may be stopped at any established check point in accordance with the SOPs for safely stopping vehicles.¹⁶³
- Once a vehicle has been stopped at a check point, police will establish a safety zone at the check point by setting up sufficient traffic cones around the work area.
- The senior police officer at each check point will take adequate measure to ensure the safety of persons and vehicles approaching the check point.
- Only one vehicle is to be stopped at a check point at any time.

The following extracts from operational orders demonstrate how police planned to stop vehicles during mobile operations:

Mobile police units will stop vehicles at one of the designated check point areas within the [search area] ...¹⁶⁴

Mobile police units will patrol the allocated zones and direct vehicles to the designated check point.¹⁶⁵

The traffic control team ... will randomly select vehicles travelling within any of the three authorised zones directing them to one of the designated check points.¹⁶⁶

Upon escorting a vehicle to a designated mobile checkpoint area ... [police will conduct general drug detection].¹⁶⁷

The above extracts show that police were mindful of the limit on the power to stop vehicles in search areas. However, the following extract casts some doubt on their understanding of the precise limit of the stop power:

For the purpose of this mobile operation ... the officer will patrol the authorised zones selecting vehicles at random, based on any information from the number plate recognition system or based on local knowledge.

*The officer will then stop each vehicle directing it to one of the predetermined check points. Every vehicle should be stopped in a safe manner and in accordance with NSW Police Motor Vehicle Stopping Techniques and Procedures.*¹⁶⁸ [Emphasis added.]

It is not clear whether during the above operation police actually stopped vehicles in the search area and thereafter directed them to a check point. However, if police did stop vehicles in this manner, it is our view that this practice was not sanctioned by the power to stop a vehicle under section 9(1).

Further, it is our view that it would be undesirable for police to use other random vehicle stop powers — such as the power to stop a vehicle to conduct random breath testing — when the real purpose is to stop the vehicle so that it can be directed to a check point for screening. This is because the power to stop a vehicle to conduct random breath testing appears to limit or confine the purpose for which the stop power can be used. Relevantly, section 13(4) of the *Road Transport (Safety and Traffic Management) Act 1999* provides:

Without limiting any other power or authority, a police officer may, for the purposes of this section, request or signal the driver of a motor vehicle to stop the vehicle. [Emphasis added.]

In addition, the exercise of any power for an ulterior purpose may expose police to the allegation that the power was not exercised in good faith, or was improper, or unlawful, which could potentially lead to the exclusion of any evidence obtained.¹⁶⁹

Ombudsman observers attended one mobile operation and noted the following practice:

Case study 3

Mobile operation¹⁷⁰

Police in southern NSW conducted a mobile operation along a major highway. Two highway patrol vehicles were deployed both within and outside the search area to identify vehicles to be stopped. The highway patrol officers would target particular vehicles based on intelligence about drug couriers, radio checks and other observations.

Once identifying a vehicle, the highway patrol officers would follow the vehicle until it approached the unattended check point, which consisted of both sides of a 500-metre stretch of highway where the speed limit was 80km/h. Police would then activate their warning devices (lights and sirens) indicating to the driver of the vehicle to pull over. Once the vehicle came to a halt, the highway patrol officers established a safety zone around the stopped vehicle by placing traffic cones (witches hats) around it. In addition, the warning lights on the highway patrol vehicles continued to alert other vehicles to the presence of police.

Shortly after the vehicle had been stopped, an additional four police officers and the drug detection dog, who were located out of sight in streets adjacent to the check point, attended the site, screened the vehicle, and conducted searches when required. No safety concerns were noted during this operation. In addition, no drugs were seized during the operation.

4.2.1.2. Establishing a check point

According to police, the effectiveness of mobile operations hinged on their capacity to maintain minimal visible presence during operations. The utilisation of unattended check points, as illustrated in the above case study, ensured that the nature and location of the operation were not easily discernable to vehicles travelling through the search area.

However, some police raised questions about what the establishment of a check point entails. For example, does the establishment of a check point require police to remain at the check point for the purpose of stopping vehicles, or can police establish a check point, and thereafter remove themselves from the check point until a vehicle is stopped at, or directed to the check point?

On the one hand, it may be argued that to establish a check point police must remain at the check point. For example, section 10 of the *Drug Detection Trial Act*, which deals with check points, provides:

(1) A police officer may, at any time during the period in which an authorisation remains in force, remove a check point from one location and re-establish it at any other location in the search area.

(2) A police officer who establishes a check point must ensure that adequate measures are taken to ensure the safety of persons and vehicles approaching the check point.

Sub-section 10(1) appears to suggest, by the use of the verbs 'remove' and 're-establish' that some police presence is required at an established check point. There must be something there to be moved that assists the stopping and searching function. If it is only the actual presence of police officers, the act of leaving a check point unattended may suggest that it has been removed and that it will be re-established if and when police return.

In addition, sub-section 10(2) refers to the obligation of a police officer who establishes a check point to ensure the safety of persons approaching the check point, which may arguably require the officer to be at the check point to fulfil this obligation. However, it is also arguable that police may fulfil this obligation by conducting site and risk assessments of suitable check points before the commencement of an operation and employing safe stopping procedures when escorting a vehicle to the check point. This latter interpretation appears to accord with the intention of Parliament to increase the flexibility and mobility of operations and make them less predictable and more difficult to evade.¹⁷¹

The NSW Police Force expressed the following view about the establishment of check points:¹⁷²

The major consideration when establishing the operation site and area is the opportunity to safely stop and process the target vehicle. The locations of check points should be established in advance of the operation, marked on a map of the search area and included in the operational orders. These sites are risk-assessed to ensure their suitability.

The senior police officer at each check point will ensure that adequate measures are taken to ensure the safety of vehicles approaching, and travelling through, the check point. Every vehicle stop at an established check point should be conducted safely and in accordance with the NSWPF Motor Vehicle Stopping Techniques and Procedures.

... there are significant human and other resources required to conduct a [drug detection trial] operation. The physical requirements for a static location are similar to those of a large RBT site, although the requirement for 'hot' and 'cold' zones does complicate the issue and the availability of suitable sites. The use of a mobile strategy further adds to the complexity of the operation but as with all aspects of this operation, and as observed by the Ombudsman, police perform all duties in line with requisite OH&S and safety requirements.

4.2.2. Operations on privately-owned land

Section 9(1)(c) of the Drug Detection Trial Act gives police the power to conduct general drug detection in authorised search areas. Section 7 requires that the search area be located in an 'outer metropolitan area' and that it not be more than 5 square kilometres in area.

Section 3(1) defines 'outer metropolitan area' as any land within this State that is located outside the metropolitan area of the State.

The reference to *any land* in the definition of outer metropolitan area appears to suggest that police may have the power to conduct operations at or on privately owned land that forms part of the authorised search area.

For example, police conducted operations at four different petrol station truck stops during the review period. These truck stops, or roadhouses, are privately owned yet are open to the public.¹⁷³

We asked the NSW Police Force for their view on whether police are lawfully entitled to enter privately owned land situated in a search area specified in an authorisation. We also asked if the fact that the privately owned land is open to the public influenced their view.

The NSW Police Force view is:

The [Drug Detection Trial] Act does not give police the power to enter private premises without the permission of the owner. For example, police could not enter a private residence situated within a search area to conduct general drug detection in relation to a vehicle parked in the garage on the premises. To enter such premises without consent would amount to trespass.

Where privately owned land is open to the public, police (as members of the public) may enter onto such land. However, where the consent to enter or remain on the land is withdrawn by the owner or occupier, police would be compelled to leave unless another ground for staying had been established, such as the establishment of a crime scene.¹⁷⁴

The authorisation granted for an operation at a truck stop contained the following condition:¹⁷⁵

In respect to [the truck stop] — in my view, although it is strictly unnecessary to seek permission to enter the land to establish the check point, it may be preferable that police (upon establishing the check point at [the truck stop]) advise the operator of the [name of petrol station] what is occurring. In doing this, police should be

mindful to ensure that they do not create any false impression that the [Drug Detection Trial Act] creates any additional power of entry.

In summary, there is nothing within the [Drug Detection Trial] Act that would prevent an authorisation specifying a search area that includes some privately owned land. Having said this, the fact that an authorisation has been granted, provides no additional power of entry to that land. As the truck stop area is generally open to and used by the public, police are equally permitted to use that land. However, because that land is in fact privately owned, if the owner/occupier/person apparently in charge asks police (or any other person) to leave, police (or such other person) would be lawfully required to leave the premises.

Ombudsman observers attended the operation at this truck stop. We noted the operation was initially delayed by the process of seeking consent of the person in charge of the truck stop. During this period, a large number of heavy vehicles exited the truck stop before police had the opportunity to screen them with the drug detection dog. No drugs were seized as a result of the operation at the truck stop.

In our view, it may be undesirable for police to plan drug detection operations that depend on external factors such as consent of the owner, occupier, or person in charge of the location. For example, if the person in charge of the truck stop did not consent to police conducting the operation at the truck stop, approximately 15 police officers and the drug detection dog would have been unable to conduct their duties, which would have been a waste of valuable police time and resources.

In stating this, we are not being critical of the police decision to conduct the operation at the truck stop, which appeared to be based on a sound strategy to target vehicles stopped before an established static check point at another location.

4.2.3. Opening doors and putting dogs in cabins of heavy vehicles

Section 11(2) of the Drug Detection Trial Act provides:

A police officer using a dog to carry out general drug detection under an authorisation must comply with the following:

...

(c) the police officer must not allow the dog to enter any driver or passenger area of a vehicle, except as provided by paragraph (d),

(d) the police officer may allow the dog to enter any driver or passenger area of a vehicle only if the police officer is entitled to search it and all persons have left the area to be searched,

(e) the police officer must not direct a person to open the door of a vehicle unless the police officer is entitled to search the person or vehicle or is otherwise entitled to give such a direction,

(f) the police officer must not direct a person to open an area of a vehicle that is not a driver or passenger area of the vehicle, unless the vehicle is used for commercial purposes (including the transport of goods) or is a public passenger vehicle.

Section 11(3) of the Drug Detection Trial Act provides:

A police officer using a dog to carry out general drug detection under an authorisation may:

(a) if a vehicle is used for commercial purposes (including the transport of goods), or is a public passenger vehicle, allow the dog to enter an area of the vehicle that is not a driver or passenger area of the vehicle (for example, the boot, back of a goods vehicle or luggage hold of a coach), and

(b) use the dog for general drug detection outside any vehicle.

Sections 11(2)(e) and (f) state that a police officer must not direct a person to open the door of a vehicle unless the officer is entitled to search the vehicle or is otherwise entitled to give the direction.

The circumstances in which an officer is entitled to search a vehicle are reasonably clear. For example, an officer would ordinarily be entitled to search a vehicle if she or he formed a reasonable suspicion that a person inside the vehicle is in possession or control of a prohibited drug,¹⁷⁶ or that the vehicle contains a prohibited drug.¹⁷⁷

However, the circumstances that would *otherwise* entitle a police officer to give a direction to open the door of a vehicle are less clear.

It appears that section 11(2) is aimed at ensuring that, with the exception of commercial vehicles, police use a dog for general drug detection outside a vehicle¹⁷⁸ in a 'fast and non-intrusive' manner.¹⁷⁹

Accordingly, it appears unlikely that the facilitation of screening with a drug detection dog would otherwise entitle a police officer to give a person a direction to open a door. It is less clear whether occupational health and safety concerns would otherwise entitle an officer to direct a person to open the door of a vehicle.

4.2.3.1. Purpose for directing a person to open a door

Ombudsman observers noted occasions during pre-operational briefings where drug detection dog handlers would encourage police to get drivers to open doors suggesting that this would enhance the capacity of the dog to detect the scent of a prohibited drug concealed in the vehicle. One handler requested that police *'get drivers to open doors using your communication skills'*. The handler acknowledged that there was no power to require a person to open a door and suggested that officers could make a request such as *'Do you mind opening the door?'*¹⁸⁰

There appear to be a variety of views of what police can lawfully direct a person to do. For example, the operational orders for one operation advised:

*If relying solely on the powers under the authorisation the person occupying the vehicle should NOT be directed to open the door of the vehicle to facilitate the screening process.*¹⁸¹ [Original emphasis.]

However, at one pre-operational briefing the officer in charge suggested that a direction to exit the vehicle would be a reasonable direction under section 9(1)(f) of the Drug Detection Trial Act. In addition, the officer advised that it may be an offence not to comply with the direction.¹⁸²

Similarly, a senior officer we interviewed stated:

*Well the legislation actually contradicts itself in that I can't direct [a driver] to open the door. However, to facilitate screening I can direct [the driver] to exit the vehicle. How they do that is a matter for themselves as long as I don't say 'open your door' I'm not in breach of the legislation.*¹⁸³

When it was suggested to the above officer that it may not be a reasonable direction if in effect it requires a driver to open the door, the senior officer responded by saying:

*But the legislation provides that I can screen the person connected with the vehicle so at the end of the day to facilitate that I'm able to give them a reasonable direction to exit the vehicle and at this stage as it stands the only thing I can't say is 'open the door and get out of the vehicle.'*¹⁸⁴

It appears that Parliament intended that drivers and passengers would ordinarily remain in their vehicles during screening. Thus, in our view, it may be difficult to argue that a direction to exit a vehicle is reasonable in circumstances where the direction abrogates the effect of the legislative provision proscribing the practice.

4.2.3.2. Requesting heavy vehicle drivers to alight from their cabins

Ombudsman observers noted a number of requests during drug detection operations such as:¹⁸⁵

I'll just get you to open the door.

Mate can you just switch off the engine and come down.

Mind just turning off the engine and stepping down here.

Can you just switch off your vehicle and hop out for me.

As discussed below (at paragraph 4.2.3.3), it may be difficult for some people to discern whether phrases like these are requests or lawful directions.

The majority of requests were made to heavy vehicle drivers who were sitting high up in cabins. Police usually requested heavy vehicle drivers to alight or step down from their cabins due to safety concerns associated with officers climbing up the side of the truck to:

- inform the driver for the reason for the exercise of the power and the nature of the procedures to be carried out (pursuant to section 9(3)(c)), and
- give the driver a written notice (pursuant to section 12).

In our view, asking heavy vehicle drivers to alight from their cabins is an entirely sensible practice given the occupational health and safety risks associated with officers climbing up the side of trucks. As one senior officer opined:

*I think it is entirely practical to ask a heavy vehicle driver to step down [from the cabin] to facilitate communication [as] it is not practical to have officers climbing up and down vehicles [from an OH&S perspective].*¹⁸⁶

We raised this issue during the border areas trial and recommended the legislation be amended to allow police to ask drivers of commercial vehicles to step out of their vehicles if Parliament determined that heavy vehicle drivers should be subject to a higher level of scrutiny than other drivers.¹⁸⁷ However, Parliament did not make any amendments in relation to this aspect of the legislation.

4.2.3.3. Consent policing¹⁸⁸

The police practice of requesting or seeking permission to do something in the absence of any explicit power raises the vexed and complex issue of consent policing. The issue is further complicated where there are specific legislative provisions regulating or proscribing the practice that police are seeking to do.

Essentially, consent policing involves a police officer making a request or seeking permission to do something in circumstances where he or she may not otherwise have a specific power to act. It is worthwhile noting that this type of policing is commonplace and members of the public regularly accede to requests by police either in the spirit of co-operation, or because they assume that police officers only make requests when they are authorised to do so under a specific power.

The inherent difficulty with consent policing is the fact that the person consenting to a police request may not fully understand that they need not comply with the request. For example, a person interacting with a police officer may not readily differentiate between requests on the one hand, and lawful directions on the other. This may result in the person failing to appreciate they have the right to refuse unless the police officer explicitly advises the person.¹⁸⁹

As noted above, sections 11(2)(e) and (f) state that a police officer must not direct a person to open the door of a vehicle. In addition, sections 11(2)(c) and (d) state that a police officer must not allow a dog to enter any driver or passenger area unless the officer is entitled to search the area and all persons have left the area.

During various drug detection operations Ombudsman observers noted that police sometimes requested drivers to open their car or cabin doors. There were also occasions where police requested permission to place a drug detection dog in the cabin of a heavy vehicle. In all instances we observed, these requests were complied with. In addition, Ombudsman observers did not observe police explicitly advise any person that they did not have to comply with such requests.

4.2.3.4. Police views

We asked a number of senior police about the appropriateness of the practice of requesting or seeking permission to conduct activities that are proscribed. One senior officer suggested:

*You can ask someone to do anything. I mean if you ask them to hop down, they hop down, all well and good. If they say no I suppose you move on.*¹⁹⁰

Another senior officer opined:

*You can certainly ask people to do things whether they choose to or not is a matter for themselves.*¹⁹¹

We asked the NSW Police Force for their view on the appropriateness of requesting drivers to open doors and received the following response:¹⁹²

The legislative requirement that police not direct a person to open vehicle doors is clear. The manager of Detection Operations has advised that this particular legislative requirement has been communicated on a number of occasions to every dog handler. Dog Unit coordinators have also been instructed to provide all Dog Unit officers deployed to [drug detection trial] operations with a copy of the relevant sections of the legislation referring to Dog Handler responsibilities. Dog handlers report that they are aware of the legislative requirement and that other police officers involved in operations have also been aware.

While officers involved in operations have not always specifically informed drivers that they may refuse to open vehicle doors, all requests made have provided drivers with the opportunity to refuse. Where drivers refused permission, the issue was not pursued.

[The NSW Police Force] considers that the practice of requesting drivers to open vehicle doors is appropriate, provided the request is fully explained, that is, that it is not a direction and that the driver may refuse permission. This practice would ensure compliance with section 11(2)(e) of the [Drug Detection Trial] Act and provide the best chance for the detection of prohibited drugs.

We also asked police for their view on the appropriateness of the practice of requesting permission to place a drug detection dog in the cabin of a heavy vehicle. The NSW Police Force advised:

*There is no legal impediment to such a request. Whether such a request is otherwise appropriate is not a legal decision and would turn on the circumstances of each case.*¹⁹³

In addition, we sought the NSW Police Force view on the appropriateness of obtaining a person's consent to conduct an activity that has a specific legislative proscription such as not allowing a drug detection dog to enter a driver or passenger area of a vehicle, or directing a person to open a door of a vehicle in circumstances where police are not entitled to search the vehicle. The NSW Police Force suggested:

*The appropriateness of such practice will depend on the circumstances of each situation. As a general proposition, if a police officer has the informed consent of a person to conduct an activity (an activity of the nature that consent may be given), then it is not unlawful for police to engage in that activity. Where police take an action because they have the consent of a person to do it, they are not exercising the powers set out in the [Drug Detection Trial] Act.*¹⁹⁴

4.2.3.5. Discussion

There does not appear to be an authoritative legal statement on the precise limits of consent policing. It appears that police can legitimately request or seek permission to conduct any activity — of a nature that consent may be given — in circumstances where there is no legislation regulating the activity or the legislation is silent as to how police ought to conduct the particular activity.

However, the question that arises during drug detection operations is whether police can request or seek permission to conduct an activity the Drug Detection Trial Act specifically proscribes such as directing a person to open the door of a vehicle or allowing a dog to enter the driver or passenger area.

In our view, noting that Parliament prescribed and proscribed the manner in which police should exercise the powers conferred, it is preferable for police not to conduct proscribed activities during drug detection operations. Or put another way, when Parliament sets out the manner and limits for the exercise of a power — including certain proscriptions — it is unlikely to be appropriate to vitiate the proscriptions by obtaining consent to conduct the activity that is proscribed. This is because the practice goes beyond the bounds of intrusion that Parliament intended. In addition, such actions have the potential to jeopardise prosecutions insofar as it may be open to a court to characterise them as improper and/or unlawful, which may lead to the exclusion of evidence obtained.¹⁹⁵

We note the NSW Police Force view that police are not exercising the powers set out in the Drug Detection Trial Act when obtaining consent to conduct an activity proscribed in the legislation. This proposition, of itself, appears correct.

However, we also note that the *opportunity* to obtain consent arises by virtue of police exercising powers conferred by the Drug Detection Trial Act such as the power to stop a vehicle at a check point. Thus, it could be argued that police may not be exercising the original stop power in good faith in circumstances where they thereafter obtain consent to conduct an activity that is the subject of specific legislative proscription. A determination by a court that police did not exercise a power for which it was conferred in good faith may similarly jeopardise prosecutions.

It is worth noting that section 18 of the Drug Detection Trial Act provides:

(1) Nothing in this Act prevents a police officer from doing any of the following:

...

(c) exercising any other function under this or any other Act or law at, or in relation to, a search area or a vehicle or person in a search area,

or affects the exercise of any such function.

However, section 18(1)(c) does not appear to address the issue of obtaining consent given that it is not a function that appears in any other Act or law that we have been able to identify.

4.2.4. Requesting personal details from persons searched

The issue of how police request and obtain personal details from persons searched during drug detection dog operations was raised during the Ombudsman's review of the *Police Powers (Drug Detection Dogs) Act 2001*.¹⁹⁶

As a result of recommendations contained in that review, and various complaints about the manner in which police obtained personal details during searches, the NSW Police Force now advises officers that:

*You do not have the power to demand the details of the person if they have not committed an offence.*¹⁹⁷

In circumstances where a person searched declines to provide their details, police are instructed to record details of the searches in two separate, generic Central Names Index ('CNI') profiles on COPS — Unknown Male and Unknown Female.

A check of the generic profiles did not reveal any records of searches conducted during drug detection operations, which suggests that police obtained and recorded details of all searches on the CNI profiles of persons searched.

However, we came across the following note in a debrief report:

During the operation at no time did any person fail to disclose their identity (Section 16 LEPPRA).¹⁹⁸

In addition, a number of operational orders made reference to the power to require drivers and passengers to be disclosed pursuant to Part 3, Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPPRA').

The above references appear to suggest that some police are of the belief that LEPPRA requires that persons stopped disclose their identities to police. This belief is not entirely correct. Part 3, Division 2 of LEPPRA requires that a police officer suspect on reasonable grounds that the vehicle may have been used with or in conjunction with an indictable offence before making a request for a driver and/or passenger to disclose their identity. However, we note that police have the various powers under road transport legislation to request drivers produce their driver's licence and/or log-book.

4.2.5. Use of drug detection dogs from other agencies

During one drug detection operation police utilised an Australian Customs Service drug detection dog and handler. When asked about this practice, a senior police officer observed:

... a drug dog is a drug dog ... [the Customs dog] worked as well ... as our own dogs.¹⁹⁹

Section 3(1) of the Drug Detection Trial Act defines 'general drug detection' as the detection of prohibited drugs or prohibited plants in the possession or under the 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 9 of the Drug Detection Trial Act provides:

(1) A police officer may, in accordance with an authorisation, exercise any or all of the following functions in respect of the search area and vehicles and persons in the search area:

...

(c) if a vehicle is stopped at a check point or stopped in the search area, use a dog to carry out general drug detection in relation to a person in or on, or seeking to enter or leave, the vehicle or in relation to the vehicle,

...

(3) A police officer must, before exercising a function under subsection (1)(c), provide the person subject to the exercise of the function with the following:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power and the nature of the procedures to be carried out.

In addition, section 11 provides:

(1) In addition to any other authority conferred on a police officer by or under any other Act or law, a police officer is authorised to use a dog to carry out general drug detection as provided by this Part.

(2) A police officer using a dog to carry out general drug detection under an authorisation must comply with the following:

(a) the police officer is to take all reasonable precautions to prevent the dog touching a person,

(b) the police officer is required to keep the dog under control,

...

Relevantly, section 18A of the Drug Detection Trial Act provides:

The functions conferred on a police officer under this Act may be exercised by the police officer with the aid of such assistants as the police officer considers necessary, subject to any conditions of the relevant authorisation.

We sought the NSW Police Force view of the appropriateness and lawfulness of the practice of using non-police handlers and dogs to exercise functions under the Drug Detection Trial Act and received the following response:

The NSWPF has no issues with the use of an Australian Customs drug detection dog and handler for operations under the [Drug Detection Trial] Act. Ownership of the dog does not affect the ability of the customs dog to fulfil the role of a 'dog' under the [Drug Detection Trial] Act.

Although the Act makes it clear that the use of a dog for drug detection is a function to be exercised by a police officer, the Act makes it clear provision for the use of assistants (see section 18A). The use of Customs drug detection dogs and handlers to assist police in the exercise of functions under the Act is therefore, lawful.²⁰⁰

In our view, section 18A appears to provide a relatively wide scope for the type of assistants that police may utilise when conducting general drug detection. Accordingly, the NSW Police Force view of the use of non-police assistants to conduct general drug detection appears to be consistent with the legislation.

However, we note that it may be possible to argue that the Customs dog handler is doing more than *assisting* a police officer when participating in a drug detection operation. For example, it could be argued that the Customs dog handler, who is physically in control of the dog on a lead and is encouraging it to seek out drugs, is actually exercising the function in section 9(1)(c). If this is the case, compliance with the safeguards in section 9(3) would be problematic.

Similarly, it could also be argued that the Customs dog handler is fulfilling the obligation to take all reasonable precautions to prevent the dog touching a person and to keep the dog under control pursuant to section 11(2) given that he or she is physically in control of the dog on a lead.

In *Harnett v State of New South Wales*, a case that considered the meaning of a similar provision to that contained in section 18A, his Honour Dunford J observed:

... an assistant is someone who assists and a distinction is to be drawn between an assistant who acts with and helps a principal and a delegate or representative or agent who acts in place of the principal.²⁰¹ [Original emphasis.]

In *Harnett* the principal was not physically present during the operation under consideration, which is unlike the situation here where a police officer is physically present when the Customs dog handler and dog screen vehicles.

We note that Part 11, Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, which authorises the use of drug detection dogs in public places, does not permit police to use assistants.²⁰² Accordingly, it may be prudent for the NSW Police Force to seek further legal advice on this issue given that it is not uncommon for police in the non-metropolitan regions to utilise the services of non-police dogs and handlers — see below (at paragraph 5.5.6.1).

4.2.6. Requesting to see the authorisation

The Drug Detection Trial Act, unlike its predecessor Border Areas Trial Act,²⁰³ does not contain a legal requirement to produce a copy of the authorisation if requested. However, the SOPs for the drug detection trial contain the following instruction:

Duty to show authorisation — The officer in charge of each search area will show the authorisation to any person in the search area who requests to see it.²⁰⁴

At one drug detection operation a heavy vehicle driver requested to see the authorisation. After a short period of time, the authorisation was located and shown to the driver who read it and thereafter thanked police.²⁰⁵

4.2.7. Reasonable suspicion to search

The Drug Detection Act does not create any new search powers for police.²⁰⁶ The SOPs for the drug detection trial contains the following advice for police:

If, during the course of the use of the dog for general drug detection, the dog exhibits behaviour it is trained to exhibit when it detects a prohibited drug or prohibited plant, this fact may well give rise, in the mind of a police officer, to the requisite reasonable suspicion to lawfully search the subject vehicle or person.²⁰⁷

The SOPs also advise police that there must be a *'factual basis for searching police to have a reasonable suspicion of the presence of a prohibited drug or prohibited plant in the vehicle or on the person to be searched.'*²⁰⁸ [Emphasis added.]

In addition, NSW Police Force policy recommends that any information utilised by the officer in forming a reasonable suspicion that there may be drugs in a vehicle or in the possession or control of a person be included in the COPS entry.²⁰⁹

During pre-operational briefings Ombudsman observers regularly heard dog handlers advise police that drug detection dogs are just a tool to aid in the formation of a reasonable suspicion. However, it appears that many police are of the view that a drug detection dog indication, of itself, may be sufficient for the formation of a reasonable suspicion to lawfully search a person and/or vehicle:

*NB After a positive indication by a drug detection dog, the subject vehicle will be subjected to a thorough search.*²¹⁰

*If the drug detection dog gives a positive indication the vehicle will be comprehensively searched.*²¹¹

The issue is addressed in the draft SOPS for drug detection dog operations:

*Police are again reminded that an indication given by a Drug Detection Dog **DOES NOT** on its own provide Police with the power to search, nor does it suffice for an officer to 'suspect on reasonable grounds' possession of a prohibited drug.*²¹² [Original emphasis.]

In addition, it also appears that some police adopt a broad interpretation of the factual basis required to enliven the reasonable suspicion to search. For example, one senior officer we interviewed opined:

*A [drug detection] dog gives us an indication that the person, at some stage recently, has come into contact with prohibited drugs. Based on that dog's indication it's been held that that forms a reasonable cause to undertake a search.*²¹³

Similarly, we found the following statement in a COPS event:

*The drug detection dog indicated to the handler that the accused had recently been near or in possession of [a] prohibited drug.*²¹⁴

We are not aware of any legal authority for the proposition that police can form a reasonable suspicion to lawfully search based on a suspicion that a person has recently been near or in contact with prohibited drugs. In our view, police are required to form a reasonable suspicion that a person is *currently* in possession or control of a prohibited drug before they are lawfully entitled to search the person.²¹⁵

4.3. Rate of finding drugs

As noted above (at paragraphs 3.2 and 3.4), the rate of finding drugs after an indication by a drug detection dog was 23%. That is, during the review period, police did not locate drugs in over three quarters of the searches of vehicles and/or its occupants after a drug detection dog indication.

The seemingly low rate of finding drugs after a drug detection dog indication has the capacity to undermine public confidence in the ability of drug detection dogs to accurately detect the scent of prohibited drugs. It may also call into question the police practice of relying on a drug detection dog indication as one of the factors relevant to the formation of the requisite reasonable suspicion to search a person and/or vehicle.

4.3.1. Possible reasons for low rate of finding drugs

4.3.1.1. Cannabis smoke

One possible reason for the relatively low rate of finding drugs after an indication is the fact that drug detection dogs appear to be able to detect cannabis smoke. Ombudsman observers regularly heard police inform persons searched that the dogs can pick up the smell of cannabis on people who have recently used or been around people using cannabis.

After noting a similarly low rate of finding drugs (26%) during the review of the *Police Powers (Drug Detection Dogs) Act 2001*, the Ombudsman recommended that police refine the training of drug detection dogs to better exclude cannabis smoke, residual scents and prescription drugs.²¹⁶

The NSW Police Force did not support the recommendation and advised that drug detection dogs are not trained to detect cannabis smoke. In addition, the NSW Police Force suggested that there was no scientific evidence to suggest that a drug detection dog would indicate the presence of cannabis on a person who had been in the presence of other people smoking cannabis. In May 2007, the NSW Police Force advised that it had not given the recommendation any further consideration.²¹⁷

However, during this review we sought further advice from the NSW Police Force in relation to the issue of cannabis smoke and received the following response:

Training drug detection dogs to disregard cannabis smoke is not practical as anecdotal evidence suggests that the odour of cannabis smoke is the same (to the dog) as that of the drug in its solid form. However, in order not to strengthen the behaviour, dog handlers do not positively reinforce the dog when it indicates cannabis smoke.²¹⁸

If the odour of cannabis smoke and the odour of solid or dried cannabis are indistinguishable to the dog, then the practice of not reinforcing cannabis smoke indications may serve little purpose. If the two forms of cannabis odour are the same, then to the drug detection dog, this would be the same as not reinforcing indications related to solid cannabis.

The lack of clear evidence as to what cannabis-related odours the drug detection dogs indicate, combined with our findings that indications more frequently than not do not lead to police locating drugs, seriously undermine the certainty with which police may rely on indications as a factor in forming a reasonable suspicion to search for drugs.

In our view, the NSW Police Force has an obligation to address the cannabis smoke issue given the high proportion of potentially embarrassing and humiliating public searches which do not result in the seizure of prohibited drugs.

4.3.1.2. Prescription drugs

Another possible reason for the relatively low rate of finding drugs is the fact that drug detection dogs sometimes detect prescription drugs as demonstrated by the following case study:

Case study 4

Prescription drugs located²¹⁹

A 48-year-old male and 46-year-old female were stopped at a check point in western NSW at 9am. As a result of a drug detection dog indication police searched the man and woman. No prohibited drugs were located.

The man and woman informed police that they had been in contact with the prescription drug Oxycontin — an opiate-based medication. After producing the medication and associated prescriptions, the man and woman were allowed to leave.

As we noted during the review of the *Police Powers (Drug Detection Dogs) Act 2001*, drug detection dogs appear to indicate the presence of prescription drugs despite not being trained to do so. We also noted that ordinarily it is not an offence to be in possession of prescription drugs. Nor does there appear to be any legal obligation on persons in possession of prescription drugs to carry evidence of the fact that it was lawfully prescribed and dispensed.²²⁰

4.3.1.3. Dogs make mistakes

A number of officers we spoke to during the review noted that drug detection dogs are not infallible and that it is possible that they may occasionally indicate incorrectly. For example, one senior officer opined:

The dogs are not foolproof ... they can become tired or distracted ... I guess it goes on the quality of the dog.²²¹

The following case study demonstrates a situation where a handler recognised the limitation of working with a dog who may occasionally become distracted.

Case study 5

Indication on chicken²²²

The car of two young German travellers in their twenties was stopped at a check point on a major highway. The drug detection dog appeared to make an indication at the rear driver's side door. The dog handler stated that he wasn't 100% sure about the dog's indication. The handler asked the couple if they had any food in the car and they responded that there was some cooked chicken in the car.

Police asked the couple if they could search the car. The couple agreed and co-operated with police who conducted a cursory search of the car. When the chicken was located, the dog handler said he thought his dog was hungry and said that he was satisfied that no further searching was warranted. The police thanked the couple for their co-operation and apologised for the inconvenience. No drugs were located. The couple were stopped for seven minutes in total.

In addition, boredom, motivation, fatigue and environmental factors may also affect a drug detection dog's capacity to detect the scent of prohibited drugs as it is trained to do.

4.3.1.4. Police do not conduct thorough searches²²³

One senior officer we interviewed noted that many handlers are concerned about the way in which some police conduct searches after an indication by their drug detection dog:

*... the handlers have issues because if the searching police do not do their job right, it reflects upon people's perceptions of whether the dog is accurate or not ...*²²⁴

Another senior officer we interviewed acknowledged that police may not be conducting thorough searches. The officer opined:

*Police officers are not trained to search ... we're trained to deal with information.*²²⁵

4.3.2. Quality control of drug detection dogs

The NSW Police Force undertakes quarterly odour recognition assessments of each drug detection dog as part of quality assurance and to assist in identifying any training needs.²²⁶

During this review we asked the NSW Police Force to provide details of in-the-field assessments of dog teams and measures of quality control that have been implemented since our review of the *Police Powers (Drug Detection Dogs) Act 2001*. We received the following response:²²⁷

The only reliable assessments the Dog Unit can conduct is during controlled training exercises. In operational environments there are a number of factors that cannot be controlled, some are: possible ineffective searching of persons by police, inaccurate information being provided by persons indicated, persons evading indication by being near another person indicated and detained. ...

The Dog Unit randomly deploys trainers into the field to assess dog teams during operations as a quality control measure. Issues identified are actioned in training as an ongoing process of improvement. Dogs are assessed regularly as to their ability to locate the target odours in operational training and fully assessed over all competencies annually.

4.3.3. Accuracy of drug detection dogs²²⁸

A basic measure of the accuracy of a drug detection dog is to look at the rate of finding drugs after an indication. Another similarly crude measure of accuracy includes the rate of finding drugs after an indication plus any admissions a person makes in relation to recent use or contact with drugs. For example, when police officers search a person as a result of a drug detection dog indication, and no drugs are located, officers ask the person searched if they have recently used or been in possession of a drug.²²⁹ Information about previous drug contact or use is recorded by police (see paragraph 4.4 below) and used to assess the dogs' operational performance.

A senior officer from the Dog Unit we interviewed questioned the usefulness of such measures of accuracy. The officer noted that the performance of drug detection dogs has always been benchmarked upon the statistical results of live operations. The officer suggested that such a figure of accuracy is misleading because what it might be demonstrating is not the accuracy of the dog *per se*, but the accuracy of police in finding drugs that may have been secreted in intimate locations or concealed in imaginative ways.

The officer opined that the only way to test the accuracy of drug detection dogs is to put them through a controlled validation program designed to measure the effectiveness of the training the dogs receive to detect the scent of prohibited drugs. Only then, argued the officer, would the handler, who believes that their dog is almost always correct, and members of the public, be able to objectively critique the ability of drug detection dogs to accurately detect the scent of prohibited drugs.

The officer suggested the validation program would measure the objective performance of the dogs in controlled environments, which would independently confirm the effectiveness of — or identify deficiencies in — the training methodology currently utilised at the Dog Unit. The officer envisaged that the validation program would be conducted independently by researchers attached to a university through a research grant.

In our view, the independent validation of drug detection dogs may have some merit if issues associated with indications on cannabis smoke, prescription drugs and other residual scents are also addressed. Any validation process should not merely focus on the ability of drug detection dogs to accurately detect drugs as per their training, but should also attempt to identify and address the high rate of indications that do not lead to the seizure of drugs in operational environments.

We appreciate that this may be a complicated task. Clearly it is necessary given the unacceptably high proportion (75% or more) of usually very public and potentially embarrassing searches conducted by police that do not result in the seizure of drugs, and the fact that the NSW Police Force does not currently appear to have any effective strategies for addressing this critical issue.

4.4. Recording of searches on COPS

NSW Police Force policy states that all searches — whether drugs are located or not — should be recorded on the Computerised Operational Policing System ('COPS').²³⁰

Police officers record searches conducted during drug detection operations by creating a COPS event with a 'Person Search' and/or 'Vehicle Search' incident.

If drugs are located, police are directed to create a COPS event containing a 'Powers — Person Search' (or 'Vehicle Search') incident with further classification 'Item/Object Found'. Police are also advised that *'[t]here is no need to create an incident for drug detection, as this is covered by the "person search" incident.'*²³¹

If drugs are not located, police are directed to create a COPS event containing a 'Powers — Person Search' (or 'Vehicle Search') incident with a further classification 'Item/Object Not Found'.²³²

In addition, police are directed to enter details of the drug dog team (the handler's police registration number and the name of the drug detection dog) in the 'Search Details' section.

4.4.1. Examination of recording practices

We examined all search records on COPS made by police as a result of operations.²³³ We found that police generally recorded searches appropriately.

However, for one operation, we discovered some concerning recording practices. Of the 35 events recorded on COPS for this operation, almost two-thirds (22 of 35) contained an incident category 'Actual Drug Detection' with a further classification 'Other Drug Detection/Seizure Offence' in circumstances where no drugs were seized and no drug offence detected. A closer examination of these 22 events revealed:

- Six events where the person/s made some admission of prior drug use (smoking cannabis) or being around or near others in possession of, or using prohibited drugs.²³⁴
- Nine events where the person/s made no admissions of prior drug use or contact²³⁵ — the event narrative usually stated:
The [person of interest] denied being near or consuming any illegal drugs.
- Six events with no reference to any admissions of prior drug use or contact where the narrative suggests that the person/s may have had previous drug contact²³⁶ — the event narrative usually contained the statement:
It appears that [name of person] may have had residue from an illegal substance.
- One event with no narrative which appears to be incomplete.²³⁷
- All 22 events were checked by a Sergeant.

The following case studies illustrate the type of information police recorded in the event narratives.

Case study 6

No drugs located, admission of prior use²³⁸

A drug detection dog indicated the presence of a scent of a prohibited drug while screening a 24-year-old male motorcyclist. The COPS event narrative, with an incident category of 'Actual Drug Detection', states:

The [person of interest] was cautioned and then asked several questions. The [person of interest] informed police that he had been smoking cannabis the previous night. A search of the [person of interest] was conducted however nil illegal drugs were located. [The person of interest] was allowed to leave the location. Nil offences detected.

Case study 7

No drugs located, no admission of prior drug use or contact²³⁹

A 38-year-old male driver of a heavy vehicle was stopped at a check point on a major highway in western NSW. The COPS event narrative, with an incident category 'Actual Drug Detection', states:

The drug detection dog was deployed with a positive detection coming from [the driver]. Police informed [the driver] that he and his vehicle would be searched. Police conducted a search of [the driver] and his vehicle, and failed to find any prohibited drug. It appears that [the driver] may have had residue from an illegal substance. ... [The driver] told police that it may have been from another driver, as he had only just taken possession of the prime mover. [The driver] was visibly shaking and told police that he "does not touch the shit".

Our examination of the remaining 13 events for the operation revealed:

- Six events contained the incident category 'Actual Drug Detection' in circumstances where drugs were seized.²⁴⁰
- Seven events contained the incident category 'Actual Powers — Person Search', the further classification 'Item/Object Not found', and associated factor 'Drug Related' in circumstances where no drugs were seized.²⁴¹ In four of these events the person made some admission of cannabis use or being around others who had used cannabis.

The following case study illustrates the difficulties sometimes faced by police when trying to accurately record what occurred during an incident.

Case study 8

Small amount of cannabis located, no admission of drug use or contact²⁴²

A 25-year-old female was stopped at a check point during an operation in western NSW. The COPS event, with an incident category of 'Actual Drug Detection', contains the following narrative:

The [person of interest] alighted from her vehicle. [Name of drug detection dog] then [screened] the [person of interest] and her vehicle. [Name of drug detection dog] indicated a detection on the [person of interest] by sitting behind her. The [person of interest] was cautioned and then asked several questions. The [person of interest] denied having been near or consuming any illegal drugs.

A search of the [person of interest] was conducted however nil illegal drugs were located.

[Name of drug detection dog] was placed inside the [person of interest's] vehicle and again indicated the presence of drugs. A search of the vehicle located a plastic resealable bag that appeared to have a very small amount of left over cannabis. The amount was so small that it was impossible to extract any from the plastic bag.

[The person of interest] admitted that her ex-boyfriend has been very active in the drug scene and has used the vehicle in the past.

Nil other items located. [The person of interest] was then allowed to leave the scene.

The above event also records under the heading 'Modus Operandi Details':

Place of secretion, Vehicle.

In addition to the 22 events where police appear to have incorrectly recorded what occurred, we also discovered some isolated examples of inaccurate recording practices during operations at licensed premises which were conducted in conjunction with drug detection trial operations.

For example, police created a COPS event with the incident category 'Actual Drug Detection' and further classification 'Other Drug Detection/Seizure Offence', which contains the following narrative:²⁴³

About 6.40pm on [date] police conducted a walk through of [name of licensed premises]. The police dog [name of dog] indicated on the person of interest [name of duty manager of the licensed premises]. The [duty manager] was cautioned and subjected to a search. Nothing of interest was found upon [the duty manager] [who] told police that he had not used or been near any person involved with any prohibited substance.

For reasons that are not readily apparent, the above COPS event also contains the notation 'Warning Given'.

Police also created a COPS event with the incident category 'Actual Drug Detection' after a 33-year-old male — who had been searched with no drugs located — stated that he had not used cannabis or any other drug for many years after having been charged previously.²⁴⁴

Another example of inaccurate recording involved a 38-year-old female patron of licensed premises. The COPS event, with an incident category 'Actual Drug Detection' and further classification 'Other Drug Detection/Seizure Offence', contains the following narrative:²⁴⁵

The drug detection dog indicated upon the person of interest [name of person] [who] was subjected to a search. Whilst no prohibited drugs or paraphernalia were found on the person of interest she did have in her possession a great deal of literature related to prohibited drugs.

The exact nature of the literature referred to in the narrative is unclear. In addition, the event contains the notation 'Warning Given' although the reasons for this are also unclear.

Police also created a COPS event with the incident category 'Actual Drug Detection' in circumstances where they believed a person was in possession of prohibited drugs but had an opportunity to dispose of the drugs before being searched — see case study 2 above (at paragraph 4.2.1).

4.4.2. Impact of inaccurately recorded events

There are many cogent reasons for ensuring that the information recorded on COPS is sufficiently detailed and accurate. The misleading recording practices identified above are concerning for three reasons. First, the information in the COPS event narratives reveals that some police consider an indication by a drug detection dog, of itself, as evidence that a person has been in possession of a prohibited drug despite the fact that on some occasions there was no evidence or admissions on which to base such an inference or conclusion.

Second, the recording of misleading or inaccurate information on a person's COPS record has the potential to prejudice future police dealings with the person. For example, when police conduct radio checks on a person in the field, police radio (VKG) operators might conduct a quick scan a person's record and note the incident category 'Actual Drug Detection'. If this information is relayed back to the officer in the field, without further elaboration of the exact nature of the previous incident, the officer may decide to conduct a search of the person and/or their vehicle in circumstances where they may ordinarily not have taken that course of action.²⁴⁶

Third, we note that the NSW Police Force extracts from COPS the number of drug detection and person search incidents for publication in their annual report.²⁴⁷ For example, last year the NSW Police Force reported that there were 20,210 drug detection incidents in their Annual Report for 2006–07.²⁴⁸ Accordingly, the discrepancies noted above cast some doubt on the accuracy of the figures used by police.

In our view, the NSW Police Force should take steps to correct the discrepancies identified above and implement training and education aimed at ensuring information recorded on COPS for incidents involving drug detection dogs adequately reflects the incident and any information gathered by police.

The NSW Police Force advised that the 22 incorrectly recorded events will be reviewed and amended to more accurately reflect what occurred. In addition, the NSW Police Force will consider sending out a state-wide memo to reinforce the correct recording policies and procedures for person and vehicle searches.²⁴⁹

4.5. Privacy of searches

Section 13 of the Drug Detection Trial Act provides:

A police officer who exercises a function under an authorisation must ask for the person's co-operation and carry out the function:

- (a) in a way that provides reasonable privacy for the person subject to the exercise of the function, and*
- (b) as quickly as is reasonably practicable.*

The privacy of searches continued to be a challenge for police during the drug detection trial as demonstrated by the following case study, which also raises issues about the protection of a person's belongings during searching.²⁵⁰

Case study 9

Persons searched within view of coach passengers²⁵¹

A passenger coach heading to Melbourne was stopped at a check point on the Hume Highway at around 1am. The drug detection dog entered the luggage hold and made indications on three pieces of luggage, which were unloaded and placed on the footpath next to the bus.

The coach driver assisted police in identifying the owners of the luggage and requested they disembark from the coach. Police then searched the luggage in the presence of the owners on the footpath next to the coach. The footpath provided good lighting for police although it did not appear to provide much protection for the belongings (mostly clothes), which were placed on the ground in contact with grass and soil.

At one point, police conducted a person search of an Israeli male in his early twenties. The male removed his jacket and the contents of his pockets. In addition, police conducted a frisk search. All of this was within view of approximately 12 other passengers who watched the search from inside the bus. No drugs were located as a result of any of the searches conducted by police.²⁵²

Ombudsman observers noted that police generally attempted to provide a higher degree of privacy when conducting strip searches. For example, Ombudsman observers noted that police sometimes conducted strip searches in mini buses used for random breath testing. On one occasion, police accompanied a man in his early twenties to the toilet of a nearby service station to conduct a strip search given the lack of privacy at the location where the man's car was stopped.

One senior officer we interviewed noted the competing priorities for police when conducting person searches in public places:

I think we have to balance officer safety and the integrity of evidence gathering versus [ensuring] someone's privacy as we do in any contact with members of the public when we conduct searches at licensed premises, on the street, or on the highway.²⁵³

There are clearly a number of challenges for police conducting operations in public places as the following case study demonstrates.

Case study 10

Person charged for hindering police conducting a search in a public place²⁵⁴

A heavy vehicle driver was being searched by police at a check point located at a truck parking bay on a major highway. A 59-year-old man came within two metres of the search when police asked him to move away as he was hindering a police operation by invading the privacy of the driver being searched. The man responded to the request to move away by saying "You can get fucked. This is a free country and I'll stand where I want."

Police again asked the man to leave the area. The man relocated to the footpath some several metres away. As he was still within viewing and hearing distance of the search, police approached the man again and issued him with a move-on direction to leave the area as he was hindering a police investigation. The man replied: "I'm doing nothing wrong." A police officer informed the man that he was "hindering a police investigation and the person being searched had a right to privacy." The man retorted: "Privacy my arse, you blokes have him stopped and you have a video camera on him."

Police issued the man a further two move-on directions which the man failed to comply with. Police requested the man produce identification, which he failed to do. Police decided to search the man to obtain identification at which point the man began to struggle.²⁵⁵ Police arrested the man, handcuffed him, and escorted him to a nearby police station to establish his identity and charge him with hinder police officer in the execution of duty and fail/refuse to comply with request by a police officer.

The charges were later withdrawn at court due to an incorrect charge being laid and insufficient evidence in the brief.²⁵⁶

4.6. Contact with people from non-English speaking backgrounds

It is relatively common for police conducting operations on major transport routes to come into contact with people from non-English speaking backgrounds as demonstrated by the following case study:

Case study 11

Searching persons from a non-English speaking background²⁵⁷

Two Iraqi men in their thirties were stopped late at night at a check point on a major highway in southern NSW. A drug detection dog screened their car but did not make an indication. During the screening an officer asked the driver where the men were heading and what they proposed to do when they got there. The driver said the men were travelling to Shepparton to go fruit picking. The driver's slow response to the questions aroused suspicion in the officer who decided to conduct a search of the vehicle.

The two Iraqi men did not object to the search and co-operated with police. They appeared to understand what the officers were saying to them although it was clear that they had limited English. While the car was being searched an officer asked the driver if he had any contact with illegal drugs. At this point, the driver's demeanour changed and he appeared to be concerned by the question. He asked if he could speak to an interpreter. The officer did not directly respond to the request and asked the driver if he understood what was going on. The driver said "No" and again requested an interpreter. The officer said "Don't worry about that now." A few minutes later the search concluded and the men were told they were free to go. No drugs were located.

In our view, it would have been preferable for the officer in the above case study to have acted upon the request by the man to speak with an interpreter given the concern he exhibited.²⁵⁸ In addition, having some written information available in community languages may alleviate concerns of people from non-English speaking backgrounds stopped by police during operations.²⁵⁹

4.7. Roadside drug testing

One of the most vexed issues raised by police during the drug detection trial involved the availability of roadside drug testing during drug detection trial operations.

4.7.1. Instruction not to conduct roadside drug testing

The SOPs for the drug detection trial contain the following instruction to police:

Operations under this legislation must not be mounted in conjunction with random roadside testing operations (testing the oral fluid of motorists for the presence of illicit drugs). There is an agreement between the Minister for Police and the Minister for Roads that this not occur during the trial period.²⁶⁰ [Original emphasis.]

The rationale behind the agreement is not entirely clear. One senior officer stated:

I think it is because they didn't want to confuse the results. It may have clouded the effectiveness of this legislation [Drug Detection Trial Act].²⁶¹

At a steering committee meeting before the commencement of the drug detection trial, a representative from the Ministry for Police stated that police should not conduct roadside drug testing during drug detection trial operations as:²⁶²

- there is an understanding between the Minister for Police and the Minister for Roads that the two schemes would not be run in conjunction with each other
- the two schemes are for different purposes — one is about road safety while the other is about the law enforcement of drug trafficking
- the RTA is funding roadside drug testing, and
- conducting both operations at the same time would cloud the evaluation of both schemes.

At another steering committee meeting held approximately midway through the review period, police again raised the possibility of conducting roadside drug testing during drug detection trial operations 'given the high number of drug affected drivers observed.' The Ministry for Police representative reiterated that this was not an option during the trial.²⁶³

4.7.2. Police views

A number of senior police expressed strong views about the restriction on conducting roadside drug testing during drug detection operations:

*... I think it's ridiculous, we're doing this operation, stopping all of these people, breath testing, [screening with a] drug dog and saying 'Oh, you can't drug test.'*²⁶⁴

*I think the drug testing thing is a great piece of legislation. To this day I still do not understand why it wasn't allowed to be used in conjunction with this legislation. At the grass roots the troops were devastated they couldn't use it ...*²⁶⁵

Ombudsman observers noted that during drug detection operations police faced the dilemma of what action to take when they observed a driver who appeared to be under the influence of a drug, or when a driver made admissions of recent drug use. The following comments illustrate the concerns of police:

*In a number of instances there were indications that drivers may have recently consumed prohibited drugs. Without witnessing any adverse driving conduct or a failure to complete a sobriety test police could not take action in relation to a [drive while under the influence of drugs] offence. These drivers were allowed to drive from the [check point] even though police were aware that they may be driving with prohibited drugs in their system.*²⁶⁶

*Twenty two percent of vehicles stopped returned a positive indication to prohibited drugs. This information strongly supports the need to modify standard operating procedures for this operation to include mobile drug testing of drivers.*²⁶⁷

One senior officer noted the following:

*You've got a duty of care. If you didn't test a person or take some steps to test them before you let them drive away and they drive five kilometres down the highway and cause a fatal [accident] and they find out later that there was a huge amount of drugs in their body but you didn't test them because of the SOPs — I'd like to know what the coroner's views on it would be.*²⁶⁸

Another senior officer observed:

*... a major risk to the community is from [heavy vehicle drivers] using drugs where they are having accidents and causing deaths ... [because in some instances] their industry is pushing them to the limit to get the product to market the next morning.*²⁶⁹

4.7.3. Driving under the influence of drugs

It is a criminal offence for a person to drive or attempt to drive a motor vehicle while under the influence of drugs²⁷⁰ or while certain illicit drugs are in the person's oral fluid, blood or urine.²⁷¹

It appears that there are two ways that police can determine if a driver is drug affected:

- 1) police who have reasonable cause to believe that a person is or was driving a motor vehicle on a road, may require the person to undergo an oral fluid test, which is a test used to determine if certain illicit drugs are in the driver's oral fluid,²⁷² or
- 2) police who have a reasonable belief that a driver is under the influence of a drug (based on the manner of driving), may, after conducting a breath test (for alcohol) and a sobriety assessment, arrest the driver and take them to a hospital to obtain blood and urine samples to test for the presence of drugs.²⁷³

As noted above, police were instructed not to administer oral fluid tests during operations under the drug detection trial. It seems that the only viable option available to police conducting drug detection trial operations who were confronted with drivers who appeared drug affected, was to arrest the driver and take him or her to the nearest hospital to obtain blood and urine samples to test for the presence of drugs. Police took this course of action on two occasions during the review period.

On one occasion, police arrested a 22-year-old female and took her to a local hospital to obtain blood and urine samples. It appears that police formed the view that she may have been drug affected due to her '*demeanour and persistent agitation*' during the search of her vehicle as a result of a drug detection dog indication.²⁷⁴ The officer in charge of the matter advised that the analysis of the samples revealed small amounts of THC (cannabis) in the woman's system. However, the doctor who conducted the analysis determined that the amount of THC did not allow for an expert opinion on whether the levels would have been sufficient so as to impair the woman's ability to drive.²⁷⁵

The other occasion is outlined in the following case study:

Case study 12

Driver taken to hospital for drug testing²⁷⁶

During a static operation conducted on a major highway in western NSW, police stopped and screened a Pantec rental truck at a check point. As a result of the drug detection dog indicating the scent of a prohibited drug, police conducted a search of the truck, the driver and passenger.

The search of the 28-year-old male passenger resulted in police seizing 0.7 grams of cannabis, 1.3 grams of amphetamine and a glass pipe. The passenger was charged with two counts of possess prohibited drug and one count of possession of equipment for administering prohibited drugs. He pleaded guilty to the three charges and was fined a total of \$1000.²⁷⁷

While talking with the 28-year-old male driver, police observed that his eyes were glazed, watery and blood shot and that his pupils were enlarged. Police also noted that he was slow to respond to questioning. As a result of these observations, police formed the view that the driver may have been affected by alcohol or drugs.

Police conducted a roadside breath test for alcohol, which returned a negative result. After some further questioning by police, the driver admitted that he had consumed cannabis and amphetamine before being stopped by police. Police arrested the driver and conveyed him to a local hospital for blood and urine testing.

The tests, which took a few months to be completed, revealed the presence of cannabis and amphetamine in the driver's blood. A doctor opined that the presence of these drugs would have impaired his ability to drive a motor vehicle.

After receiving the results of the tests, police charged the driver with drive under the influence of drugs. The driver pleaded guilty to the charge and was fined \$600 and disqualified from holding a licence for six months.

While police are to be commended for their efforts in the above case study, it appears that their actions may not have been lawful in the circumstances. Relevantly, Division 5 of the *Road Transport (Safety and Traffic Management) Act 1999* requires police to complete a number of steps before a person may be lawfully arrested for the purpose of obtaining blood and urine samples to determine if the person was driving under the influence of drugs.

In particular, section 25(2) of the *Road Transport (Safety and Traffic Management) Act* requires police to reasonably believe the driver is under the influence of drugs based on the manner in which the driver drove or attempted to drive a vehicle. This requirement would appear to suggest that an officer must reasonably believe that a person is under the influence of drugs based on how the driver drove the vehicle rather than observations or admissions once a driver has been stopped by police at a check point.

This issue was recently discussed in the *Police Weekly*, which is an internal NSW Police Force publication containing articles, information, and legal advice for police officers. Law Notes 07/06 contains the following advice in relation to the formation of the reasonable belief that a driver is under the influence of drugs:²⁷⁸

There is a common misconception that [the basis of the belief] requires police to personally observe the manner of driving. That is not correct. You are quite entitled to base your belief on the things you are told by witnesses regarding the manner of driving, and any physical evidence such as your observations of the scene of a collision or similar.

Saliently, the advice goes on to state:

The most important thing is that your belief that the driver may be under the influence of a drug must be based on the manner of driving. You cannot rely on other things such as your observations of the subject, or a smell of cannabis or the presence of a bong in the vehicle.

The above two cases demonstrate the unenviable position police find themselves in during drug detection operations given the requirements of the drive while under the influence of drug legislation and their inability to administer an oral fluid test.

One senior officer noted that the limitation of administering oral fluid tests may have been well intentioned:

... when you have RTA inspectors involved [in an operation] they become very oriented on traffic, on defecting the vehicles for tyres and this and that where the police are trying to run a drug-related operation and I think that's why the SOPs [endeavour] to keep a focus on what you're doing. But I certainly would apply any other legislation if I believed it needed to be applied.²⁷⁹

However, the NSW Police Force noted the following in response to a question about other types of operations targeting vehicular drug trafficking:

At a general level multi-faceted operations combining road safety or other objectives with drug detection actions allow police to target multiple crime categories at once, maximising the use of finite police resources. The benefits of such multi-faceted operations is particularly important in geographically remote commands where the cost of conducting [drug detection trial] operations can be prohibitive.²⁸⁰

While we appreciate that roadside drug testing has yet to be fully rolled out in New South Wales, it is of some concern that police conducting drug detection operations were not given the opportunity to administer oral fluid tests in appropriate circumstances.

The initial results of roadside drug testing released by the NSW Police Force in May 2007 revealed that drivers tested were three times more likely to be under the influence of illegal drugs than alcohol. That is, in the first four months of 2007, police data revealed that one in 46 drivers tested were found to have illicit drugs in their system, while one in 130 were under the influence of alcohol. In addition, police found that in some areas, one in eight long haul truck drivers were detected driving under the influence of drugs, mostly with amphetamines.²⁸¹

We note that during many drug detection operations police targeted road safety issues in addition to, or to complement, drug detection activities. For example, during one operation, police conducted in excess of 800 random breath tests, which demonstrates that police conducted other activities with road safety objectives during drug detection operations. This appears to be an entirely sensible approach and it accords with community expectations that police utilise finite resources wisely.

In our view, the disquiet expressed by police in relation to the lack of access to oral fluid testing during drug detection operations appears to be well founded.

Endnotes

¹³² No regulations were promulgated during the review period.

¹³³ *Police Powers (Drug Detection in Border Areas Trial) Act 2003*, s.5(2) and s.6(2).

¹³⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.1.

¹³⁵ Interview A transcript, pp.10–11. Controlled operations are undercover law enforcement operations where the participants have prior authority to technically break the law in order to investigate and deter crime and corrupt conduct. See the *Law Enforcement (Controlled Operations) Act 1997*.

¹³⁶ Interview A transcript, p.12.

¹³⁷ Interview D transcript, p.2.

¹³⁸ Interview E transcript, p.2.

¹³⁹ Interview A transcript, p.13.

¹⁴⁰ Police Association of NSW submission, February 2008, p.2.

¹⁴¹ Interview A transcript, p.2.

¹⁴² Interview E transcript, pp.1–2.

¹⁴³ Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, Annexure B. See Appendix 4 for a copy of an authorisation granted during the review period.

¹⁴⁴ Interview C transcript, p.2.

¹⁴⁵ Interview F transcript, p.1.

¹⁴⁶ NSWPF Application for authorisation, 14 December 2007, p.2.

¹⁴⁷ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, Annexure B.

¹⁴⁸ See Appendix 4 for a copy of an authorisation granted during the review period.

¹⁴⁹ See below (at paragraph 5.5.2) for further discussion on the 'element of surprise'.

¹⁵⁰ NSWPF Legal Services advice, 6 December 2007.

¹⁵¹ The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2042.

¹⁵² NSWPF Application for authorisation, 9 November 2007. NSWPF Authorisation granted, 12 November 2007.

¹⁵³ NSWPF Application for authorisation, 21 March 2007, p.1.

¹⁵⁴ NSWPF Authorisation, 29 June 2007, p.1.

¹⁵⁵ NSWPF Application for authorisation, 26 June 2007, p.1.

¹⁵⁶ NSWPF Authorisation, 17 July 2007, p.1.

¹⁵⁷ As a result of our review of the border areas trial, we recommended that the SOPs be amended to make clear the extent and limits of the power to: stop vehicles outside the search area; and direct vehicles outside the search area to a check point. See paragraph 12.10 'Roving vehicles' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.135–6. This recommendation was not implemented by the NSW Police Force during the drug detection trial.

¹⁵⁸ It is noted that section 9(1) says that police can exercise *any or all* of the powers in sub-sections (a)–(f). Thus, it may also be arguable that police can stop vehicles at a check point (pursuant to s.9(1)(b)), without having established the check point

(pursuant to s.9(1)(a)). However, this view does not appear to accord with the intention of the legislation given the references during the parliamentary debate to establishing check points and stopping vehicles at check points.

¹⁵⁹ Note that directing a vehicle to a location to be searched would be part of the search power contained in either section 21(1)(d) or 36(1)(e) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁶⁰ NSWPF COPS ref: E32020524.

¹⁶¹ See above (at paragraph 2.4.2) for a brief overview of how police conduct mobile operations.

¹⁶² NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.7.

¹⁶³ NSW Police Force College, School of Operational Safety and Tactics, *Motor Vehicle Stopping Techniques and Procedures*.

¹⁶⁴ NSW Police Force, *Operational Orders*, Canobolas Local Area Command, December 2007, p.8. NSW Police Force, *Operational Orders*, Barrier Local Area Command, February 2008, p.9.

¹⁶⁵ NSW Police Force, *Operational Orders*, Monaro Local Area Command, January 2008, p.8.

¹⁶⁶ NSW Police Force, *Operational Orders*, Monaro Local Area Command, November 2007, p.5.

¹⁶⁷ NSW Police Force, *Operational Orders*, Lachlan Local Area Command, December 2007, p.8.

¹⁶⁸ NSW Police Force, *Operational Orders*, Monaro Local Area Command, 20 December 2007, p.9.

¹⁶⁹ *Evidence Act 1995*, s.138(1). Of course, it does not follow that police, when exercising a power for the purpose for which it was given, are not able to take action in relation to any other offences they detect when exercising that power. For example, s.13(4) of the *Road Transport (Safety and Traffic Management) Act 1999* states that the stop power does not limit any other power or authority, so if a vehicle is stopped under some other power — such as the stop power in s.9(1) of the *Drug Detection Trial Act* — then there appears to be no impediment to requiring the driver to undergo a breath test. Ombudsman observers noted this practice during a number of drug detection operations.

¹⁷⁰ Ombudsman observer notes.

¹⁷¹ Ms Linda Burney, Parliamentary Secretary, NSWPD, Legislative Assembly, 14 November 2006, p.102. See also the Hon. Henry Tsang, Parliamentary Secretary, NSWPD, Legislative Council, 16 November 2006, p.4164.

¹⁷² NSW Police Force response to the Issues Document, 28 February 2008, p.12.

¹⁷³ See below (at paragraph 5.7.2.4) for details of the impact of operations at roadhouses.

¹⁷⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.9.

¹⁷⁵ NSWPF Authorisation, 6 March 2007, pp.2–3.

¹⁷⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s.21(1)(d).

¹⁷⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s.36(1)(e).

¹⁷⁸ *Police Powers (Drug Detection Trial) Act 2003*, s.11(3)(b).

¹⁷⁹ The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2042.

¹⁸⁰ Ombudsman observer notes.

¹⁸¹ NSW Police force, *Operational Orders*, Goulburn Local Area Command, December 2007, pp.4–5.

¹⁸² Ombudsman observer notes.

¹⁸³ Interview A transcript, p.21.

¹⁸⁴ Interview A transcript, p.21.

¹⁸⁵ Ombudsman observer notes.

¹⁸⁶ Interview A transcript, p.22.

¹⁸⁷ See paragraph 12.8 'Asking heavy drivers to step down from the cabin' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.129–131.

¹⁸⁸ For a further discussion of consent policing, see paragraph 14.8 'Consent' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.217–220.

¹⁸⁹ In *DPP v Leonard* [2001] NSWSC 797(14 September 2001); (2001) 53 NSWLR 227; (2001) 127 A Crim R 381 at paragraph [64] his Honour James (Greg) J held:

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

We note that some police suggest that when requests are made, members of the public are provided with the 'opportunity' to refuse (see paragraph 4.2.3.4). In our view, this opportunity may be illusory for some people. As we noted in our review of the *Police Powers (Drug Detection Dogs) Act 2001*, fair and effective policing involves the provision of information that is essential to a person independently exercising their rights. Accordingly, we recommended that police officers 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. The NSW Police Force supported this recommendation.

¹⁹⁰ Interview C transcript, p.8.

¹⁹¹ Interview D transcript, pp.10–11.

¹⁹² NSW Police Force response to the Issues Document, 28 February 2008, p.10.

¹⁹³ NSW Police Force response to the Issues Document, 28 February 2008, p.10.

¹⁹⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.11.

¹⁹⁵ *Evidence Act 1995*, s.138(1).

¹⁹⁶ See paragraph 11.2 'Obtaining information from searched persons' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.102–8.

¹⁹⁷ NSW Police Dog Unit — Search Form — No Drug Located form. NSW Police Force, *Standard Operating Procedures — Drug Detection Operations*, Draft Version 2, February 2007, p.18.

¹⁹⁸ Operation debriefing form, 21 February 2008, p.3.

¹⁹⁹ Interview E transcript, p.21.

²⁰⁰ NSW Police Force response to the Issues Document, 28 February 2008, p.11.

²⁰¹ [1999] NSWSC 265 at paragraph [19].

²⁰² *Law Enforcement (Powers and Responsibilities) Act 2002*, s.59 and s.71.

- ²⁰³ See paragraph 12.4 'Requesting to see the warrant' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.119.
- ²⁰⁴ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.6.
- ²⁰⁵ Ombudsman observer notes.
- ²⁰⁶ *Police Powers (Drug Detection Trial) Act 2003*, s.18(3)(b).
- ²⁰⁷ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.13.
- ²⁰⁸ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.13.
- ²⁰⁹ NSW Police Force, *Standard Operating Procedures — Drug Detection Operations*, Draft Version 2, February 2007, p.21. Our examination of search records on COPS revealed that police rarely, if ever, referred to anything more than the fact that the drug detection dog made an indication.
- ²¹⁰ NSW Police Force, *Operational Orders*, Monaro Local Area Command, 20 December 2007, p.9.
- ²¹¹ NSW Police Force, *Operational Orders*, Goulburn Local Area Command, December 2007, p.5.
- ²¹² NSW Police Force, *Standard Operating Procedures — Drug Detection Operations*, Draft Version 2, February 2007, p.17. At the time of finalising the report, the NSW Police Force had not implemented the draft SOPs.
- ²¹³ Interview A transcript, p.29.
- ²¹⁴ NSWPF COPS ref: E33121362.
- ²¹⁵ For a detailed discussion of this issue, see paragraph 14.3 'Forming a reasonable suspicion' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.195–205.
- ²¹⁶ See Chapter 8 'Accuracy of drug detection dogs' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.49–62.
- ²¹⁷ Correspondence from Assistant Commissioner Reg Mahoney to Assistant Ombudsman (Police) Simon Cohen, 18 May 2007.
- ²¹⁸ NSW Police Force response to request for further information, 28 February 2008, p.3.
- ²¹⁹ NSWPF COPS ref: E31503840.
- ²²⁰ See paragraph 15.8 'Prescription drugs' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.259–261.
- ²²¹ Interview C transcript, p.11.
- ²²² Ombudsman observer notes.
- ²²³ For further discussion of this issue, see paragraph 8.2.5 'Denials, inadequate searches and evasions' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.51.
- ²²⁴ Interview transcript G, p.6.
- ²²⁵ Interview E transcript, p.20.
- ²²⁶ Interview with senior officer from the Dog Unit.
- ²²⁷ NSW Police Force response to request for further information, 28 February 2008, p.4.
- ²²⁸ For further information on this issue, see Chapter 8 'Accuracy of drug detection dogs' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.45–62.
- ²²⁹ NSW Police Dog Unit — Search Form — No Drug Located form.
- ²³⁰ NSW Police Force, *Standard Operating Procedures — Drug Detection Operations*, Draft Version 2, February 2007, p.20.
- ²³¹ NSW Police Dog Unit — Search Form — Drug Located form.
- ²³² NSW Police Dog Unit — Search Form — No Drug Located form.
- ²³³ The NSW Police Force provided the COPS event numbers pursuant to the Information Requirements document. See Appendix 2 for a copy of the Information Requirements document.
- ²³⁴ NSWPF COPS ref: E32824482; E31129348; E185978692; E31106761; E31365058; and E59518502.
- ²³⁵ NSWPF COPS ref: E59535802; E33083984; E30851444; E31472469; E32244171; E33089784; E31905753; E31451477; and E30824037.
- ²³⁶ NSWPF COPS ref: E30857352; E31003132; E31037047; E109838996; E32242608; and E31606567.
- ²³⁷ NSWPF COPS ref: E31117561.
- ²³⁸ NSWPF COPS ref: E32824482.
- ²³⁹ NSWPF COPS ref: E33083984.
- ²⁴⁰ NSWPF COPS ref: E31150911; E33539086; E30857152; E30859270; E31485343; and E31401603.
- ²⁴¹ NSWPF COPS ref: E31503840; E272961491; E30845935; E31491640; E31277121; E31126636; and E30866675.
- ²⁴² NSWPF COPS ref: E31401603.
- ²⁴³ NSWPF COPS ref: E32719407.
- ²⁴⁴ NSWPF COPS ref: E32356406.
- ²⁴⁵ NSWPF COPS ref: E32362345.
- ²⁴⁶ For further discussion of this issue, see Chapter 11 'Obtaining information and how it is recorded and used' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, pp.101–127.
- ²⁴⁷ Advice from the NSW Police Force, 14 March 2008.
- ²⁴⁸ NSW Police Force, *Annual Report 2006–07*, December 2007, p.49.
- ²⁴⁹ NSW Police Force response to draft final report, 29 May 2008, p.1.
- ²⁵⁰ For a discussion of the protection of belongings during searches, see paragraph 13.4 'Protection of occupant's possessions' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.149.
- ²⁵¹ Ombudsman observer notes.
- ²⁵² As a result of our review of the border areas trial, we recommended that the SOPs be amended to emphasise that searches of coach passengers be conducted away from the coach and not within easy view of other coach passengers. See paragraph 12.7.2 'Searches of coach passengers' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.126. This recommendation was not implemented by the NSW Police Force during the drug detection trial.
- ²⁵³ Interview A transcript, p.25.
- ²⁵⁴ NSWPF COPS ref E29273630; H29536776.

- ²⁵⁵ It is not clear if police have the power to search a person to obtain their details.
- ²⁵⁶ *Police v [Name of the accused]* (Dare LCM, Unreported, Wagga Wagga Local Court, 8 October 2007). It should be noted that the police prosecutor who withdrew the charges did not criticise the police involved. The prosecutor stated the officers involved acted in good faith.
- ²⁵⁷ Ombudsman observer notes.
- ²⁵⁸ In their response to our request for further information, the NSW Police Force advised (at p.5):
The Translating and Interpreting Service (TIS) is the standard provider of telephone interpreting services (available 24/7) and hosts a nation priority line for police [telephone number]. During [drug detection trial] operations, team leaders have mobile phones and may engage telephone interpreters to facilitate briefings, cautions and searches. To date, no concerns have been raised by LACs regarding the availability of TIS during [drug detection trial] operations. While it is reported that connection times are generally 'good', this will always be dependent on the availability of relevant language interpreters at any given time. Other issues impacting more generally on the availability of TIS include the cost and travel time to provide on-site interpreting services.
- ²⁵⁹ For further discussion of this issue, see paragraph 13.3 'People from non-English speaking backgrounds' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.148–9.
- ²⁶⁰ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.3.
- ²⁶¹ Interview E transcript, p.17.
- ²⁶² Steering Committee meeting, 16 February 2007.
- ²⁶³ Steering Committee meeting, 27 September 2007.
- ²⁶⁴ Interview D transcript, p.15.
- ²⁶⁵ Interview E transcript, p.15.
- ²⁶⁶ NSWPF Post operation assessment report, 7 December 2007, p.5.
- ²⁶⁷ NSWPF Section 15B report of conduct and results of operation, 21 February 2008.
- ²⁶⁸ Interview C transcript, p.12.
- ²⁶⁹ Interview E transcript, p.8.
- ²⁷⁰ *Road Transport (Safety and Traffic Management) Act 1999*, s.12.
- ²⁷¹ *Road Transport (Safety and Traffic Management) Act 1999*, s.11B.
- ²⁷² *Road Transport (Safety and Traffic Management) Act 1999*, Division 3A.
- ²⁷³ *Road Transport (Safety and Traffic Management) Act 1999*, Division 5.
- ²⁷⁴ NSWPF COPS ref: E30859270.
- ²⁷⁵ Telephone conversation with officer in charge, 21 February 2008.
- ²⁷⁶ NSWPF COPS ref: E103166498; H142394393.
- ²⁷⁷ NSWPF COPS ref: E103166498; H30734927.
- ²⁷⁸ NSW Police Force, *Police Weekly*, Vol 20 No. 11, 7 April 2008, p.13.
- ²⁷⁹ Interview C transcript, p.12.
- ²⁸⁰ NSW Police Force response to the Issues Document, 28 February 2008, p.12.
- ²⁸¹ See 'More drivers on drugs', *The Daily Telegraph*, 16 May 2007, p.7; Cubby B., 'More drivers test for drugs than drink', *Sydney Morning Herald*, 16 May 2007, www.smh.com.au/news/national/more-drivers-test-for-drugs-than-drink/2007/05/15 (accessed on 16 May 2007).

Chapter 5.

Effectiveness of drug detection operations

This chapter analyses the effectiveness of drug detection operations conducted during the review period by examining whether the objective of the drug detection trial has been achieved. Included is a discussion of the factors that have influenced, or impacted upon, the effectiveness of operations.

5.1. Overview of results of drug detection operations

During the review period, police conducted 23 drug detection operations utilising various deployment strategies. A total of 13 static and 10 mobile operations were conducted in the three non-metropolitan police regions at varying times of the day and night.

The authorisations to conduct the operations were based upon generic intelligence evincing in the mind of the designated officer who granted the authorisation a reasonable suspicion that the area where the operations were conducted were being used on a regular basis for, or in connection with, the supply of indictable quantities of prohibited drugs.

In the first nine months of the 18-month trial, police conducted 12 predominately static operations. The execution of the static operations closely mirrored the nine operations conducted during the border areas trial.

Only one indictable quantity of prohibited drugs was seized during the first 12 static operations. The drug seized — 9.0 grams of amphetamine — was located alongside a garbage bin near a check point. No person has been charged in respect of the seizure.

After noting the limited success of the first 12 operations, police resolved to persevere with the trial but to conduct smaller, shorter, more mobile operations, which they hoped would be less predictable and more difficult to evade.

Police devised procedures for conducting mobile operations, which attempted to address the legal and occupational health and safety challenges associated with mobile operations. These were documented in the SOPs for the drug detection trial.²⁸²

A total of 10 mobile operations were conducted between late November 2007 and the end of the review period on 22 February 2008. Some of the mobile operations involved a combination of static and mobile check points.

As a result of the mobile operations, police detected two vehicles in which the occupant/s were found in possession of five separate indictable quantities of drugs. One individual was found with 6.74 grams of cocaine, 10.7 grams (40 tablets) of ecstasy, and 1.39 grams of nexus. A further two individuals, who were travelling together in the same vehicle, were found with 9.5 and 12.5 grams of amphetamine respectively.

In addition, police seized an indictable quantity of amphetamine (11.0 grams) during a static operation conducted in December 2007.

The most successful drug detection operation conducted during the review period coincided with the *Summernats* festival in early January 2008.²⁸³ During this three-day operation, 75 police officers and two drug detection dogs stopped and screened a total of 451 vehicles. As a result of drug detection dog indications, police searched 60 vehicles and 113 persons, which resulted in 21 persons being issued with a cannabis caution and 13 persons being charged with drug-related offences including possess prohibited drug (17 charges) and supply prohibited drug (5 charges). The rate of finding drugs after an indication by a drug detection dog was 55%, significantly higher than the rate of 23% across all operations.

In contrast, police did not lay any drug-related charges in almost one-third of operations (3 static and 4 mobile) although a number of cannabis cautions (8) were issued. In a further eight operations one or two persons were charged with drug-related offences. Put another way, almost two-thirds (15) of drug detection operations resulted in the seizure of only small amounts of drugs, mostly cannabis.

Indictable quantities of drugs were only seized during 4 (17%) of the 23 operations.

Chapter 3 contains a comprehensive outline of drugs seized and legal actions taken by police. In summary:

- A total of 7 indictable quantities of prohibited drugs were seized during the review period.
- As a result of 7,527 vehicle stops, four persons in three separate vehicles were detected with indictable quantities of drugs.

- One or more drugs were located in 2% (133 of 7,527) of all vehicles stopped.
- The rate of finding indictable quantities of drugs in all vehicles stopped was 0.04% (3 of 7,527).
- The rate of finding indictable quantities of drugs where one or more drugs were located in a vehicle was 2.3% (3 of 133).
- The majority of persons detected with drugs were found in possession of extremely small amounts of cannabis.

5.2. Have the objectives of the trial been met?

The primary stated objective of the drug detection trial is the detection of persons involved in the trafficking of indictable quantities of prohibited drugs and not offences of minor possession.²⁸⁴ A secondary aim or purpose of the trial is the frustration of criminal activity associated with supply of prohibited drugs.

The results of operations conducted during the drug detection trial clearly demonstrate that the objectives of the trial have not been realised. There appears to be little or no evidence suggesting that these drug detection operations are useful in apprehending or frustrating persons involved in the vehicular trafficking and/or supply of indictable quantities of prohibited drugs.

Overwhelmingly, drug detection operations have resulted in the detection of persons involved in minor possession offences rather than those involved in the supply or trafficking of indictable quantities of drugs.

The NSW Police Force acknowledges that the drug detection trial has not significantly impacted on the vehicular trafficking of indictable quantities of prohibited drugs:

*The impact of the [Drug Detection Trial] Act on the supply of prohibited drugs/plants can only be described as minimal, taking into account the amount of indictable seizures that have been made since the trial began.*²⁸⁵

The Police Association of NSW reached the following conclusion:

*Based on the information we have received and considering the amount of time, resources and money that was invested in these operations with only minimal results achieved (and not as a result of [inadequate] intelligence or planning), this reveals the legislation as a near complete failure.*²⁸⁶

According to the Association, most operational police were of a similar view:

*The legislation allows for the use of both static and mobile checkpoint strategies but in the view of our membership, they have failed to deliver the results police seek in their efforts to stem drug transportation.*²⁸⁷

5.3. Police views of the Drug Detection Trial Act

The majority of police officers we spoke to or interviewed during drug detection operations expressed support for the object or purpose of the Drug Detection Trial Act.

Most police recognised the utility of the stop power in the legislation. As one senior officer put it:

*... if I use this legislation then I don't have to go under any other power ... I think that's what the legislation is all about ... to give us the ability to stop and screen a vehicle for drugs without having to go through the reasonable cause steps.*²⁸⁸

However, many officers opined that the legislation is impractical and that it impedes, hinders, inhibits, restricts and/or constrains police from effectively targeting drug couriers. For example, one senior officer made the following assessment:

*... the actual execution of the legislation is restrictive, resource intensive and in its current form impractical. ... deploying drug detection dogs as the focal point of an operation is inefficient given the [legal and operational] procedures that police are expected to work with.*²⁸⁹

Another senior officer provided the following example to illustrate what he perceived as the inherent problem with the legislative scheme in the Drug Detection Trial Act:

*If we've got an offender in [name of town] that's dealing drugs, and we want, we're going to put a stop to it, we target that person or that location, we don't randomly check everyone around them for the sake of it. That's where I see the [Drug Detection Trial Act] being inflexible when you've just got to have that static point or an area to go to 'cause [drug couriers] are not silly.*²⁹⁰

Another senior officer opined:

... I honestly think that this particular bit of legislation [is not] quite tailored to what the aim of the game is ... if they're saying the aim of the trial is to stop the trafficking of drugs on the highway ... it's too inflexible, ... it

doesn't give you the ability to target [drug couriers]. ...if I was going to put a critical management eye over the results of the operations we wouldn't run another one, I couldn't say it's cost effective.²⁹¹

Another senior officer observed:

... the legislation is well intended but it takes up a lot of our time and resources ... [the way operations are conducted] does not create the impression [for the general public] that problem people are being targeted ...²⁹²

Another senior officer had this to say:

... instead of becoming a piece of legislation where you could have two coppers in a car with a dog behind them just setting up a site somewhere, it turned into being 30 police [which made it] very hard to implement without a lot of resources.²⁹³

In their response to the Issues Document, the Police Association of NSW advised that the general view of officers was that the Border Areas Trial and the Drug Detection Trial Acts have taken a simple and workable operational procedure and over complicated it.²⁹⁴

The Association suggested that:

... in order to make [drug detection] operations operationally effective, [the] legislation needs to be changed so as to provide police with the ability to utilise a drug detection dog to conduct an external screening of a vehicle that has been stopped for a lawful purpose [such as] random breath testing.

The screening process is non-intrusive ... only takes a minute ... and can be done simultaneously as police speak with the driver in relation to other matters.²⁹⁵

Another senior officer observed:

If you go right back to the beginning, the only thing that we were ever asking for was the ability to use a drug detection dog to screen a vehicle at a RBT site. It was no more complicated and no more simple than that.²⁹⁶

The view that the Drug Detection Trial Act is convoluted was raised on a number of occasions. For example:

... the legislators took a simple idea and over legislated it. ... at the end of the day ... far more members of society are impacted by prohibited drugs yet we're subject in trying to detect them and frustrate drug supply routes with the constraints of the legislation.²⁹⁷

From the perspective of our members, the legislation in its current form is untenable and unnecessarily complicates what we consider to be the actual intent of the legislation.²⁹⁸

... I think there is a place for this type of operation but I think they have made it overly convoluted ... there has got to be a simple way to stop a vehicle and use a tool, in this case a dog, to search for drugs without going into this convoluted process that in application and implementation is ludicrous and time wasting ...²⁹⁹

We asked the NSW Police Force for their view on whether the Drug Detection Trial Act provides an effective mechanism to target the vehicular trafficking of indictable quantities of prohibited drugs and received the following response:

The Act does not provide an effective mechanism, in and of itself, to target the vehicular trafficking of indictable quantities of drugs/plants and the deployment of drug detection dogs, as per the current provisions of the Act, should supplement HVP [High Visibility Policing] or other operations, not act as the focal point.³⁰⁰

The NSW Police Force also noted:

While the powers are aimed at disrupting drug distribution lines within NSW, the actual execution of the legislation is seen by many police as restrictive, resource intensive and, in its current form, impractical.³⁰¹

5.4. Impact of legislative changes

During the parliamentary debate of the bill to revive the drug detection trial it was suggested that the legislative changes (outlined at paragraph 2.2) would increase the flexibility and mobility of drug detection operations as well as making them less predictable and more difficult to evade.

Our observations of police implementing the legislation, and a critical examination of the results of the drug detection operations, reveals that the anticipated benefits of the legislative changes do not appear to have been realised despite the best efforts of police.

We asked the NSW Police Force for their views on the impact of the changes. In relation to increased flexibility and mobility of operations, the NSW Police Force expressed the view that the legislation does not allow for operational flexibility:

... the nature of the legislation and associated [policies and procedures] continue to restrict the ability of police to adopt a roving and proactive approach to vehicle drug detections. ... despite the introduction of a new operational power to remove and re-establish a check point ... traffic control and OH&S requirements make it impractical to pack up and move to a new location.³⁰²

This view was echoed by a senior officer we interviewed:

... as far as moving the whole [check point] within that area, it wasn't an option, we just weren't going to do that ... [because it would take] half an hour to pack up and then reset somewhere else ... especially with the strict policy in how we operate these [operations], it's just not practical to move around.³⁰³

In addition, the NSW Police Force noted:³⁰⁴

Despite the increase in size of search areas [from 1 km² to 5 km²] and number of allowed check points, flexibility and mobility of operations is limited by the significant human and other resources required to conduct these operations ...

Also, costs continue to be a factor in determining the scope and frequency of [drug detection trial] operations, particularly those associated with securing the assistance of dog teams in remote areas.

and:

The opportunities presented by flexible and mobile deployments are generally limited, not only by the requirement to mobilise significant numbers of police and equipment, but by the availability of drug detection dogs. This is particularly so in remote areas.³⁰⁵

The NSW Police Force made the following comments when asked whether the legislative changes made operations less predictable and more difficult to evade:³⁰⁶

... the changes have made the conduct of operations less predictable in that there may be numerous state-wide locations which are the subject of an operation.

However, legislative and other requirements and the use of large static locations [which are impractical to re-locate] make it inevitable that police activities will become readily known, even being published on commercial radio stations. Presently indictable quantities of drugs being targeted are not being detected, despite intelligence holdings that particular transport routes are being used for the transport of such drugs. It may be reasonably deduced that persons transporting indictable quantities of drugs are successfully evading [drug detection trial] operations.

In addition, the NSW Police Force suggested that heavy vehicles could easily avoid operations by stopping and waiting for the operation to finish, or taking an alternate route.³⁰⁷

In relation to the increase in the size of search areas and the number of check points permitted, the NSW Police Force advised that the changes have had 'little impact' on the planning and execution of operations:

... due to the existing obligations to comply with the policies and procedures relating to traffic control and OH&S and other safety requirements. The significant resources involved in planning, setting up and managing a static site can preclude the expansion of [drug detection trial] operations beyond a sole static site.³⁰⁸

The NSW Police Force did acknowledge that:

... the ability to establish more than one check point ... created opportunities for police to counter driver avoidance tactics by establishing a presence at locations where vehicles congregate in an attempt to 'wait out' [drug detection trial] operations. However, this course of action is similarly dependent upon the availability of human and other resources and an ability to predict the locations to which vehicles will be diverted.³⁰⁹

In relation to the removal of the signage requirement at check points, the NSW Police Force advised this change 'appears to have had minimal impact on the conduct of operations'. The NSW Police Force observed that signage may still be required in order to comply with occupational health and safety obligations and the new legislative requirement (in section 10(2) of the Drug Detection Trial Act) that police take adequate measures to ensure the safety of persons and vehicles approaching the check point.³¹⁰

The NSW Police Force also identified some of the positive effects of the changes. For example, police noted that the change from obtaining a warrant from a Supreme Court judge to conduct a drug detection operation to obtaining an authorisation from a NSW Police Force designated officer appears to be beneficial:

Apart from the ease in accessing [a designated officer], police now also have the opportunity to discuss issues in the planning stage with that officer and discrepancies and oversights can now be corrected before

the operation is approved. [Although] the requirements with respect to the preparation of evidence [for the application for authorisation] are largely the same.³¹¹

A senior officer we interviewed expressed a similar view:

... there's no less work that goes into the preparation of the [application for authorisation] which the designated officer bases his decision on.³¹²

However, the NSW Police Force observed that the change from warrants to authorisations 'has resulted in an increase in work required at the region level in terms of preparing and reviewing applications.'³¹³

5.5. Factors impacting on effectiveness

As noted above (at paragraph 5.3), the majority of police are of the view that drug detection operations are an ineffective and impractical tool for targeting persons involved in the vehicular trafficking of indictable quantities of prohibited drugs.

There are many factors that have the potential to negatively impact on the effectiveness of drug detection operations. Below is an outline of the factors police identified during consultations as impacting on the effectiveness of operations.

5.5.1. Dissemination of information about operations

The dissemination of information about the nature and location of any police operation aimed at detecting persons involved in criminal activity has the potential to stymie or adversely impact the effectiveness of the operation.

This is particularly the case with operations targeting drug trafficking given the fact that persons involved in this activity are generally well-organised and may attempt to implement strategies to avoid detection.

Police have suggested, with some force in our view, that one of the biggest factors impacting on the effectiveness of drug detection operations is the dissemination of information upon or soon after the commencement of operations.

The following comments illustrate the views of police on the potential impact of the CB (Citizens Band) radio network on drug detection operations:

I think [the drug detection trial] was an opportunity for us, based on intel[ligence], to go out there unannounced and set up check points and we really were confident that we'd get a lot of indictable quantities. It didn't work because of the bush telegraph, the CBs ...³¹⁴

[Drug detection operations are] always going to be ineffective in targeting heavy vehicles because of the CB communication network.³¹⁵

CB radio has a massive impact on the effectiveness of operations. There's absolutely no doubt that within 20 minutes of us setting up, drivers everywhere knew we were there.³¹⁶

The CB radio communication network is such that as soon as they see a dog on the highway somewhere, trucks up and down the east coast of Australia know we're there.³¹⁷

The broadcast of information, usually via the CB/UHF radio network, provides drivers with an opportunity to:

- stop and 'wait out' the operation
- take an alternate route
- drop off or dispose of any drugs in their possession, or
- abandon their journey

as illustrated by the following views voiced by police:

... realistically once you pull over one truck driver with communications they've got on the UHF radio and everyone knows and they just park up.³¹⁸

Heavy vehicles sat out the deployment outside the zone and simply waited until police had gone.³¹⁹

... as soon as you set up a site the balloon goes up ... whereby the heavy vehicle industry they get onto their CBs, their two-way radios and the balloon is up straight away. They'll either go to ground, stop somewhere, offload whatever they're carrying ... or they'll divert around the site.³²⁰

... once they get the [CB] chatter going and they believe they may be pulled up and there's a drug dog ... obviously anyone that's got any drugs on them will try and get rid of them before they actually get there, throw it out the window or whatever.³²¹

We also got some specific [intelligence] in relation to [truck drivers] pulling up at locations and offloading their gear and planning on picking it up on the way back because they knew we were there because of the CBs.³²²

In addition, the Police Association of NSW noted:

*The operators of heavy vehicles (as well as the drivers of other vehicles) are able to use 2 way radios (UHF) and mobile phones to communicate information and pre-warn one another, hence providing them with the opportunity to dispose of any drugs in their possession prior to reaching the check point. Alternatively, they are able to stop their vehicle at the side of the road and wait until the operation ceases. Police have no way of stopping this exchange of information between heavy vehicle operators. The ability of truck drivers to pre-warn one another ultimately reduces the effectiveness of check point strategies, as the minimal quantities seized using such strategies can attest.*³²³

It is worth noting that one of the indictable quantities of drugs seized during the review period — 9.0 grams of amphetamine — was located alongside a garbage bin near a check point. It may be reasonably inferred that this drug was disposed of by a driver who obtained advance warning of the drug detection operation.

At another operation, police observed various heavy vehicles stopping at a service station before the check point. The service station was in the authorised search area so police directed vehicles stopped at the service station to the check point. However, police noted that 'drivers had ample opportunity to dispose of any drugs before entering the check point.'³²⁴

The impact of the dissemination of information on operational effectiveness was also noted during the border areas trial.³²⁵ The NSW Police Force suggested that three factors hampered their ability to counteract the dissemination of information via the CB radio network or mobile phone:³²⁶

1. The fact that drug detection warrants were only in force for 72 hours.
2. The onerous safety requirements meant that police took up to an hour to establish a check point, which allowed drivers to become aware of the operation before it commenced.
3. The RTA consultation requirement limited police to a few static locations, which potentially resulted in drug couriers taking routes around the locations.

We asked the NSW Police Force if the legislative changes had any affect on the dissemination of information via CB radio during drug detection operations. They provided the following response:

*The legislative changes have had no impact on the dissemination of information via CB radio. ... the overt nature of [drug detection trial] operations, due largely to significant human and other resources required ... makes them easily identifiable and this information is quickly relayed via CB radio to heavy vehicles and the like.*³²⁷

The NSW Police Force also suggested that:³²⁸

... one way of lessening the impact of driver avoidance [of operations] is to conduct an operation over a longer period, for example, several days in an attempt to force vehicles to travel through the check point. [However], [t]his course of action is heavily dependent on the availability of resources, including drug detection dogs.

Another way of achieving a similar result would be to anticipate a diversion of vehicles and activate search areas at these locations in addition to the static site. ... this course of action is similarly dependent upon the availability of human and other resources and an ability to predict the locations to which vehicles will be diverted.

The dissemination of information appears to impair the capacity of police to ensure that drug detection operations possess the 'element of surprise'. The challenge of reducing or ameliorating the impact of the dissemination of information during drug detection operations appears to be insurmountable.

5.5.2. Lack of 'element of surprise'

The NSW Police Force is of the cogent view that 'the element of surprise is a critical factor in any drug related operation.'³²⁹

When asked if drug detection operations are able to achieve an 'element of surprise', the NSW Police Force provided the following advice:

*... the various requirements for static operations in terms of 'hot' and 'cold' zones and OH&S requirements for designated check points in the authorised search area are by their very nature extremely overt. The significant police presence at these check points, consisting of searchers, video operators, scribes, dog handlers etc, represents a clear visual aid to drivers as to the existence of a major police operation. And once one heavy vehicle driver becomes aware of an operation this information is broadcast via the CB/UHF radio networks. Accordingly, it is difficult to sustain an element of surprise for any length of time, let alone the duration of the operation.*³³⁰

The NSW Police Force also advised:

It is open to police to maintain an element of surprise in non-[drug detection trial] operations targeting specific persons/vehicles. Seizures of large amounts of drugs and/or proceeds of drug supply have been affected via the stopping and searching of a target vehicle under [other] legislation (based on intelligence or other information). The 'surprise factor' is increased when unmarked police cars are used, a situation which is not easily replicated at [drug detection trial] check points not least because drug dogs can only be transported in fully marked police vehicles.³³¹

The Police Association of NSW advised:

Members are of the shared view that a major failure of the legislation is that it does not permit for the 'element of surprise' strategy. As many police can attest, the element of surprise in the use of police operations is extremely important and does work.³³²

One senior officer we interviewed noted that conducting operations at truck stops increased the element of surprise although the officer acknowledged that no drugs were seized utilising this strategy.³³³

Another senior officer suggested that it was not possible to have an element of surprise because of the number of police required to run an operation:

... truckies expect to see two or three highway patrol vehicles at any given time [on a stretch of highway] but once you get a congregation of police, which is required under the legislation for all of the different parts, they know straight away that there's an operation going on.³³⁴

Another senior officer suggested that having the ability to 'pop up here and there' under an authorisation without a search area restriction would allow police to conduct more mobile and flexible operations, which would ensure the element of surprise for operations.³³⁵ This is discussed further below (at paragraph 5.5.4.1).

5.5.3. Capacity of drug detection dogs

Another factor that has the potential to significantly impact on the effectiveness of drug detection operations is the capacity of drug detection dogs to detect the scent of prohibited drugs while screening the exterior of vehicles.

There appear to be a number of factors that may limit the dogs' capacity to detect the scent of prohibited drugs during drug detection operations. Some of these are environmental such as noise and temperature, while others are more fundamental as they call into question the capacity of the dogs to effectively perform the task which is the basis of drug detection operations. Namely, the 'fast and non-intrusive' screening of vehicles stopped at check points.³³⁶ Another factor might be the ease with which drugs can be secreted in a heavy vehicle or packed in a vacuum sealed package.³³⁷

A number of senior officers we spoke to or interviewed raised concerns about the capacity of drug detection dogs. Below is a sample of their comments:

... the hardest thing that they've tried to do here is think that a dog can walk around a semi-trailer that's fully laden and sniff drugs that could be well inside ...³³⁸

... it's a very hard thing for a dog to get a detection on a hot vehicle just pulled up ...³³⁹

... the dog was struggling trying to sniff in between the cracks in the doors, trying to look for something.³⁴⁰

In addition, officers commented on environmental factors that might affect the dogs' performance:

For the dog to operate at optimal capacity in the summer months in the Western Region are non existent. They will work for 5 to 10 minutes and have to have a break, they were just exhausted due to the actual heat, and not only that, the road heat on the paws.³⁴¹

It should be noted that the heat resulted in dog fatigue and any future operation during mid summer should be planned for hour of darkness.³⁴²

The majority of officers suggested that the legislation, which limits the areas of a vehicle where the dogs may screen, hampered the dogs' capacity:

It would appear that drug detection dogs have limitations on picking up the scent of drugs concealed within a vehicle or on persons remaining inside a vehicle which is the subject of screening.³⁴³

I think that was something that really hampered the drug dog, having the occupants stay in the car with the doors closed. ... it may be a bit more intrusive but having people actually get out of the car or the door is opened I think we'd be a lot more successful in detecting drugs.³⁴⁴

I really do think we would have had more success if we had an opportunity to put that drug dog in the cabins and all over the truck.³⁴⁵

... if a police officer is unable to allow the dog to enter any driver or passenger area of the vehicle, how then are police to stop drug transportation in trucks? Police are unable to reach up on the side of the heavy vehicle and look into it due to the height of the vehicle.³⁴⁶

In relation to heavy vehicles, Ombudsman observers noted that police almost always requested drivers to alight from the cabin for safety or other reasons such as log-book compliance checks. This practice usually resulted in the cabin door of the heavy vehicle being left open during screening and provided the drug detection dog with a better opportunity to screen the driver.

At one operation police adopted the following practice:³⁴⁷

Heavy vehicles were stopped at the checking station and highway patrol officers requested drivers to alight from their cabins with their licence and log-books. Officers did this for two reasons. First because of OH&S concerns in climbing up alongside [a] cabin and secondly due to their powers under the Road Transport Legislation.

Upon exiting the heavy vehicle the drug detection dog was placed besides the vehicle. The dog made a number of indications on the drivers of the heavy vehicles as they alighted from their cabins. In one instance one driver was found to have [an indictable quantity of drugs] as a result of the detection made by the dog.

The senior officer in charge of the above operation stated that the police practice did not appear to accord with procedural and legislative requirements. In addition, the officer opined that the drug detections occurred:

... solely because drivers were made to alight from the vehicle. In the event that the drug detection dog screened the heavy vehicles alone I believe that it would be unlikely that any detections would have been made.³⁴⁸

Another senior officer suggested that it would be 'a big step forward' if police could screen the inside of cabins. When it was suggested that this might amount to an intrusion into the driver's living and working space the officer replied:

... it might be the living quarters ... but the dogs don't get in there and rip and tear they basically get in there and sniff the airspace of the cabin ... the dog doesn't get in and destroy anything or litter or untidy things.³⁴⁹

As a result of the border areas trial review, we recommended that police and dog handlers give due consideration to the fact that some heavy drivers live and work in their cabins.³⁵⁰ In response to this recommendation, the NSW Police Force advised:

Individuals with illegal drugs will inevitably endeavour to avoid detection, and they sometimes hide illegal substances in their cabin because they live and work in their cabin. It could be argued that their increased familiarity in this environment would most likely lead them to secrete drugs in the cabin. Of course it would be reasonable for police to leave it as they had found it after completing the search.³⁵¹

It is worth noting that section 11(3)(a) of the Drug Detection Trial Act gives police the power to enter non-driver or passenger areas of commercial vehicles for the purpose of screening with a drug detection dog. With the exception of entering cargo holds of passenger coaches, police rarely utilised this power of entry during drug detection operations.

We asked the NSW Police Force about the circumstances that might impact on the dogs' capacity to detect the scent of prohibited drugs in vehicles. In relation to environmental factors, the NSW Police Force provided the following advice:³⁵²

Due to the environment in which [drug detection trial] operations are conducted, weather conditions seriously impact on the capabilities/effectiveness of drug detection dogs. Operations conducted during the warm summer months are the most debilitating, as heat and humidity have a severe detrimental effect on the dog's ability to cool itself through evaporation. Activity and prolonged exposure (some operations may utilise a dog for 12 hours) increase the dog's risk of overheating. The problem is exacerbated by a lack of shaded or air-conditioned 'stand-down' areas. The heat from the asphalt roads, along with semi-trailers' exhausts and tyres at the dog's nose height, all contribute to increasing the dog's core temperature.

Panting by the dog, in an attempt to cool itself, has an adverse effect on its 'air scenting' ability to detect target odours. In order to lower a dog's core temperature, 'cooling vests' are utilised during operations conducted in high temperatures. However, they are somewhat cumbersome on smaller dogs, making it

difficult to negotiate tight areas inside truck cabins and vehicle passenger areas. Also, the gel pack inserts only last for a few hours before requiring refreezing.

In addition to the above adverse impacts on the dog's ability to detect target odours, environmental and any associated discomfort may also decrease the dog's motivation to search. In order to reduce injury to a dog's pads caused by the hot road surfaces, a trial of 'grip tech dog boots' is to be implemented in the immediate future. However, they may further retard the dog's ability to cool down.

And in relation to other intrinsic factors, the NSW Police Force advised:³⁵³

Drug detection dogs are limited by their height when searching the exterior of any vehicle as they are trained to follow the 'seam' or door trims with their nose to detect target odours inside the vehicle. Therefore, they face considerable challenges in relation to screening semi-trailers as the seams are well above the height of the dog.

When screening the exterior of a car, an open window greatly assists the dog to detect the scent of an illicit substance. However, due to the height of a semi-trailer, any assistance gained from an open window is negligible.

The NSW Police Force acknowledged that despite extensive vehicle screening training:

*Drug detection dogs are not infallible when screening the outside of vehicles as they can miss illicit substances which are well hidden in a vehicle and where no seals are broken to allow air to escape (for example, windows, doors etc).*³⁵⁴

We note that the single largest seizure of prohibited drugs during the two trials (1017 grams of amphetamine or 'ice'), which was concealed under the back seat of a car stopped during the border areas trial, did not occur as a result of a drug detection dog indication.³⁵⁵

5.5.4. Legislative requirements

A number of police we spoke to or interviewed suggested that some of the legislative requirements in the Drug Detection Trial Act impact on the effectiveness of drug detection operations.

5.5.4.1. Search area restriction

Section 7 of the Drug Detection Trial Act provides:

The search area for which an authorisation is granted must consist of not more than 3 areas, each of which must:

(a) be located in an outer metropolitan area, and

(b) be not more than 5 square kilometres in area.

A number of police expressed frustration in relation to the search area restriction. One senior officer stated that the:

*Increase [from 1 km²] to 5km² built some flexibility into operations but ... it's a immaterial change.*³⁵⁶

Another officer suggested:

*It would be better just to identify a stretch of road.*³⁵⁷

The following comment encapsulates the views expressed by many senior police:

*I don't understand why we need to specify any distance really because we're basing our authorisation on intelligence upon a stretch of highway — not within 5km² — but along the whole highway. If we can set up one site, why can't we operate 10 kilometres up the road? What difference does it make which stretch of highway we're at? ... I mean at the end of the day we're required to show that a route is used on a regular basis, not that stretch of road, I mean that itsy bitsy road may not have had an actual drug detections but we can show through generic intelligence or information that people pass through that point ... and that's what we base our application for authorisation on.*³⁵⁸

Similarly, another senior officer observed:³⁵⁹

... it's funny we gather information suggesting that the [name of highway] is being used for the transportation of illegal drugs but we're only given a 5 kilometre area to stop and search.

... if we had the entire length of the highway then [drivers] wouldn't know what we we're up to. It would seem like routine stops [at different points along the highway] but once you concentrate on an area, because of the police numbers required, the balloon goes straight up, they know something's going on.

... if they're serious about the legislation it should be just the [name of highway] ... then you've got flexibility. Still work within the guidelines of your safety zones when you're going to pull vehicles up ... that's the element of surprise for us, not where we could become very predictable.

Other officers argued:

... we've got to have the flexibility to say the vehicle that we're looking for has turned onto [name of highway] and you've got the flexibility to go to [name of highway] and [target] that vehicle.³⁶⁰

... if you had the flexibility of a stretch of highway and targeted specific vehicles through intelligence you'd get a far better result.³⁶¹

We asked one senior officer if police were adopting a restrictive interpretation of the search area requirement. We noted that it was arguable that police could apply for an authorisation with three search areas each with the dimensions 50 kilometres by 100 metres, which equates to 5 square kilometres. We also noted that this could potentially give police the capacity to establish check points along a 150 kilometres stretch of road.

The senior officer advised that Legal Services and the Mapping Unit suggested that a search area with such dimensions was outside the parameters of the legislation.³⁶²

5.5.4.2. Establishing a check point

As discussed above (at paragraph 4.2.1.2), it appears police are required to establish a check point *before* a vehicle can be stopped at a check point. In addition, there is some doubt about what is required to establish a check point. For example, do police have to be physically at the check point *prior* to stopping a vehicle?

One senior police officer noted that the check point requirement restricts the capacity of police to conduct mobile operations utilising unattended check points. The officer noted that police are '*hamstrung by the legislation*' which prevented police from conducting short, sharp, snap, flexible, mobile operations with the element of surprise. The officer also suggested that the drug detection trial was '*doomed to fail*' given the various legislative restrictions.³⁶³

Another senior officer opined:

... [police] have to establish a check point ... [police] couldn't just have two [officers in a] normal highway patrol car just driving down the road, pull up a truck and go 'while we're here we'll just run, it's a designated area, we'll just [screen the vehicle with] the drug dog.' ... we had to have a check point and the check point had to be in accordance with OH&S requirements ...³⁶⁴

Another senior officer observed:

As long as [the Drug Detection Trial Act] remains based around a static or predominately static site, it will be ineffective.³⁶⁵

5.5.4.3. Section 12 notices

Section 12 of the Drug Detection Trial Act provides:

(1) A police officer who exercises a function under an authorisation must give the person subject to the exercise of the function a written notice containing the following particulars:

- (a) the name of the police officer and his or her place of duty,
- (b) the date, time and place at which the function was exercised.

(2) The notice must be given before, on or as soon as practicable after exercising the function.

A number of officers questioned the utility of the section 12 notice requirement. For example:

[The section 12 notice] is one of the things that hinders us the most. It's ridiculous. ... why can't we have a similar practice to RBT in that there's a verbal spiel only. In fact random breath testing is more intrusive, this legislation only allows us to walk a dog around a vehicle. ... it just seems ludicrous when we don't have to [provide written notices] for any other vehicle stop.³⁶⁶

Similarly,

Police utilise a multitude of powers daily when performing operational duties. Apart from search warrants (involving the delivery of the occupier's notice) there are no other instances where police executing a power are required to hand the person subject to the power an information sheet outlining the power. For instance, drivers stopped under the Road Transport (Safety and Traffic Management) Act for the purpose of a breath test do not receive a written notice even though this is an exercise which obstructs a citizen's free passage

and involves an intimate technique in actually conducting the breath test. The delivery of a section 12 notice in these circumstances is an onerous task.³⁶⁷

One officer noted:

*It's just a pointless exercise which is going to lead to matters being thrown out [at court] over a piece of paper ... it's pretty ridiculous.*³⁶⁸

A number of senior officers expressed the view that a section 12 notice should only be required where the drug detection dog makes an indication and police intend to search the driver and/or vehicle. This, the officers argued, is more in line with how police deploy drug detection dogs at other locations like licensed premises where police only engage patrons after an indication by a drug detection dog.

Officers also stated the section 12 notice requirement is time consuming and reduces the number of vehicles that can be screened:

*By the time you serve the notice on them, you've got these police standing around and a lot of the time there's still a lot of truck movement going on.*³⁶⁹

In addition, officers noted that it was unclear as to how to comply with section 12 when screening unattended vehicles stopped at a check point or in the search area. In practice, police left section 12 notices under the windscreen wipers of unattended vehicles that had been screened by a drug detection dog during operations at roadhouses.

5.5.4.4. Not directing a driver to open the door of a vehicle

As discussed above (at paragraph 4.2.3), police must not direct a person to open the door of a vehicle. Senior police we spoke to and interviewed expressed frustration with this proscription noting:

*... the legislation is designed to detect drugs but parts of it actually inhibit the ability of the dog to detect drugs. But for what reason though? What's wrong with someone opening their door? That's just ludicrous that we can't ask someone to open their car door.*³⁷⁰

Police noted that the capacity of the drug detection dog is enhanced when vehicle doors are open:

*There's a greater chance of a dog picking up the scent of prohibited drugs from inside the vehicle with the door open.*³⁷¹

The Police Association summed up the frustration of police:³⁷²

The question needs to be asked — is it the intent of the legislation to assist police in stopping the transportation of drugs in areas where [intelligence] suggests that this is occurring? If this is the intent of the legislation (and our members are of the view that it is) then shouldn't police have the power to direct the driver to open the door of his/her vehicle in order to allow drug detection dogs to perform the job they are trained to do i.e. to detect a scent emitting from the vehicle.

... It is the strong view of our members that police need to be granted legislative authority to be able to direct occupants of vehicles to open a door to their vehicle when asked by a police officer. Without this much needed authority, police are hindered in their ability to detect and hence stop the transportation of drugs in areas across the whole of NSW which makes the intent of the legislation nil and void.

5.5.4.5. RTA consultation³⁷³

Section 6(2) of the Drug Detection Trial Act provides:

An application for an authorisation is to be made in writing and contain the following particulars:

...

(d) a statement setting out the consultation that has taken place with the Roads and Traffic Authority

...

The SOPs for the drug detection trial instruct police to consult with the RTA before making an application for authorisation with a view to minimising traffic disruption and promoting road safety during operations.³⁷⁴

A number of senior officers expressed the view that the RTA consultation requirement is unnecessary and time consuming. For example, one senior officer suggested that consulting with the RTA had the potential to compromise the integrity — or confidentiality — of the operation and that in any event police knew where road works were occurring in their local areas.³⁷⁵

This view was echoed by officers consulted by the Police Association of NSW:

*Information provided by members indicates that the forced consultation with the RTA has the potential to compromise the integrity of the authorisation. There is no longer a control over the information by police once it is disseminated to the RTA. If in fact the integrity of the authorisation is compromised, this may in turn hinder the deployment of surprise tactics by police and affect the overall success of the operation.*³⁷⁶

We are not aware of any evidence suggesting that the integrity of any operation was compromised. In practice, the consultation between police and RTA regional traffic managers usually involves a phone conversation to discuss potential safety issues that police might encounter during the planned operation. The details of the conversation are then recorded in a statement which is attached to the application for authorisation.³⁷⁷

In our view, the consultation requirement is prudent given the capacity for RTA officers to provide expert advice and guidance on safety and traffic management strategies. In addition, RTA officers are best placed to appreciate the nature and location of any proposed road works or other events that could potentially impact on the operation.

5.5.4.6. Onerous record keeping and reporting requirements

We received mixed views about the record keeping and reporting requirements. On the one hand, one senior officer opined that the record keeping and recording requirements were no more onerous than information collected during random breath testing operations or search warrant executions.³⁷⁸

On the other hand, the Police Association of NSW advised that officers felt the record keeping and reporting requirements in the Drug Detection Trial Act (see paragraph 2.1.9) were onerous and time consuming, resulting in the diversion of police resources away from fighting crime and serving the community.³⁷⁹

In addition, the NSW Police Force stated:

*... the requirement to now provide a report on the conduct of a [drug detection trial] operation within 14 days after the expiry of an authorisation has created additional work.*³⁸⁰

However, we note that the Border Areas Trial Act also contained a report back requirement.³⁸¹

5.5.5. Occupational health and safety obligations

Ensuring the safety of police officers and members of the public, which is mandated by the Drug Detection Trial Act³⁸² and occupation health and safety legislation,³⁸³ is of paramount concern for police conducting drug detection operations.

These obligations have the potential to impact on the effectiveness of drug detection operations as they may restrict the times, locations and manner in which police are able to safely perform their duties. The following comments illustrate some of the occupational health and safety ('OH&S') challenges faced by police:

*I think a lot of it comes down to your OH&S ... you can't have police trying to pull up big trucks in the middle of the night on the highway.*³⁸⁴

*Due to OH&S concerns during darkness areas outside built up areas are not suitable to conduct these trials.*³⁸⁵

*Three zones were authorized and all worked for a period of time during this operation. One of these zones was within a semi built up area and serviced by street lighting, the other two being open highway without lighting. After OH&S assessments all operations were reverted to the built up area with lighting, open highways were found to be suitable for daylight hours only.*³⁸⁶

An officer, quoted in the Police Association of NSW submission, opined:

*The legislation is poorly written in relation to directions we can and can't give to drivers for the purpose of screening and is in conflict with OH&S requirements to some degree and other legislation where police can direct a driver to do certain things.*³⁸⁷

The Association observed:

*In relation to the screening, there is a serious OH&S implication that requires further consideration. As the drivers of heavy vehicles (due to the sheer size of the vehicle) sit considerably high off the ground in their cabins, police are unable to see their hands and hence when approaching them, cannot be sure if they have any dangerous weapons etc in their possession. Members are of the opinion that the legislation requires amendment so that police may have the power to make the drivers of heavy vehicles alight from their vehicle so that they can be spoken to ...*³⁸⁸

As noted above (at paragraph 4.2.3.2), we previously recommended Parliament consider amending the legislation to give police the authority to direct drivers of heavy vehicles to step down from their cabins. However, the Parliament did not amend this aspect of the legislation when reviving the drug detection trial.

It is worth noting, however, that Ombudsman observers did not see police engage in any conduct that posed occupational health and safety risks. For example, police would generally request that heavy vehicle drivers alight or step down from their cabins with their licences and log-books. This sensible practice reduced the occupational health and safety concerns associated with climbing up the side of a heavy vehicle to reach the cabin to talk with the driver.

5.5.6. Availability of drug detection dogs

Another factor that has the potential to impact on the effectiveness of drug detection operations is the availability of drug detection dogs in regional and remote areas.

One officer we spoke to during the review period suggested that the limited number of dogs, and the large distances that the handler and dog must travel, restricted the flexibility of operations. By way of example, the officer stated that conducting a drug detection dog operation in short bursts over 14 days to keep drug couriers guessing was not possible given the dogs were only deployed from Sydney for two to three days at a time.

Another senior officer suggested that operations were only planned over two to three days due to limited resources:

*We don't have access to drug detection dogs as easily as police in the metro area and when we want a dog we need to specify what day, what times, and for how long ... but realistically we are only ever going to be able to use them properly for one or two shifts maximum and then they'll be going back.*³⁸⁹

In respect of deploying drug detection dogs in an efficient manner, one senior officer suggested:

*... the Dog Squad haven't got the resources to maintain the deployments [for drug detection operations]. If I was running the Dog Squad I'd be saying 'I'm going to deploy my dogs targeting a particular person that's backed up by real intelligence, by evidence as opposed to just throwing them out on the highway.'*³⁹⁰

We also note that at the conclusion of one operation in far western New South Wales, the officer in charge recommended that 'a minimum of two dogs be allocated to any future operations of this nature' due to dog fatigue issues.³⁹¹

Clearly there will always be challenges in how to deploy finite specialist resources in a cost-effective manner across large geographical areas. We understand that the Dog Unit prioritised drug detection operation requests given the trial nature of the legislation. That is, the Dog Unit wanted to ensure that the trial was adequately resourced because of the potential for the legislation to become a permanent feature if successful.³⁹²

We asked the NSW Police Force about plans to increase the availability of drug detection dogs in the regions and received the following advice:³⁹³

The NSWPF Dog Unit has an authorised strength of 16 drug detection staff, including two sergeants and two leading senior constables who also perform a training role. At present there is an actual strength of 12, due to staff on long-term sick leave, return to work programs at other locations or restricted duties.

In an attempt to increase the availability of drug detection dogs in the regions, the Dog Unit is currently undertaking the following initiatives:

- 1. 'Dual dog' trial where a number of dog handlers are validated to be deployed with two dogs (1 x drug dog and 1 x firearm/explosive detection dog).*
- 2. Currently reviewing Dog Unit positions in order to determine the optimal number of drug detection handlers and dogs.*
- 3. Currently recruiting to fill all vacancies created by staff either on long-term sick leave or awaiting transfers. When completed, this will place the Dog Unit in a stronger position to service requests for assistance.*

5.5.6.1. Regionalisation of dogs

Many officers we spoke to in the non-metropolitan regions were of the view that the regional stationing of dogs would be a good idea with many positive benefits for police in those areas. For example, one senior officer suggested that the regional stationing of dogs would enable police to execute some search warrants in a more effective and less time consuming manner.³⁹⁴

We raised the issue of regional stationing of drug detection dogs during the review of *Police Powers (Drug Detection Dogs) Act 2001*.³⁹⁵ At the time, the NSW Police Force indicated that it did not support the regionalisation of dogs, citing prohibitive factors of cost; supervision; and the quality of training, accreditation and performance.³⁹⁶

As noted above (at paragraph 4.2.4), police utilised a Customs dog during one drug detection operation. We also note that the NSW Police Force currently has no agreements or memorandums of understandings regulating the inter-agency use of drug detection dogs.³⁹⁷

The practice of utilising drug detection dogs from other agencies does not appear uncommon. Police in the regions advise that if they are unable to access a NSW Police Force drug detection dog, then they may request the use of drug detection dogs from other agencies such as the Department of Corrective Services, the Australian Customs Service, the Australian Quarantine Inspection Service, and other police forces. In these circumstances, police utilise dogs which are not trained or accredited by the Dog Unit. Accordingly, we note that one of the central arguments militating against the regional stationing of drug detection dogs in New South Wales, namely, the lack of control over the training, accreditation and performance, appears to be occurring in any event given the use of non-NSW Police Force trained and accredited personnel and dogs by police in regional areas.

We interviewed a senior officer at the Dog Unit who acknowledged that NSW Police Force officers in the regions occasionally utilise drug detection dogs from other agencies when the Dog Unit — located in Sydney — is unable to meet requests for assistance. The officer stated that there were few concerns with the practice given the majority of the agencies had standardised competency based training programs in place for their dogs. The officer also noted that the NSW Police Force regularly participated in across-agency investigations and thus the issue of using drug detection dogs from other law enforcement agencies was of little concern.

The officer noted that police in both Queensland and New Zealand have dogs stationed in regional areas. However, the officer also outlined a number of questions — many with significant financial implications — that need to be considered when assessing whether to de-centralise where dogs are stationed:

- Who will be responsible for the technical training of dogs including access to prohibited drugs for training?³⁹⁸
- Who will be responsible for the day-to-day supervision and management of handlers?
- Who will oversee the staff development of handlers?
- Who decides and prioritises the efficient deployment of the dog and handler?
- Who looks after the dog when the handler is sick, injured or on leave?
- Who co-ordinates the veterinary care of the dog including regular worming and other vaccinations?
- Who conducts yard inspections to ensure compliance with minimum requirements for the safe home kennelling of dogs?

We asked the officer about the possibility of rotating handlers and dogs in the regions for short periods of time (3 months). The officer opined that *'anything is worth a look'* but noted that there would be challenges in implementing such a scheme equitably. The officer expressed a preference for placing officers in the regions permanently rather than on a rotational basis.

The officer also reiterated some of the concerns outlined above and suggested that *'simple things such as the day to day management of [handlers] and the care that they give their dogs is challenging'*. In addition, the officer suggested that there would be significant costs associated with rotating handlers and dogs, noting industrial issues such as awards and entitlements associated with being away from home; where the dog and handler would be accommodated; and which organisation unit would pay for it all.

Clearly the issue of regionalisation of drug detection dogs is complex and involves a number of issues that are not amenable to simple solution. In our view, these complexities, of themselves, do not preclude the NSW Police Force from exploring and/or trialling schemes aimed at increasing the availability of drug detection dogs in the regions. We note that the NSW Police Force is currently exploring options to increase the availability of dogs in the non-metropolitan police regions.

5.6. Cost and resource effectiveness

When conducting any activity targeting crime, the community expects police to use resources in a cost effective manner. A number of senior officers we spoke to and interviewed suggested that drug detection operations are not cost or resource effective. One senior officer stated:

*I'm not happy with the cost involved. There was a lot of money and a lot of effort put in by this region ... it was very resource intensive.*³⁹⁹

We asked a senior officer whether the results of drug detection operations justified the cost and resources utilised given that police were mainly detecting people with mostly small amounts of cannabis and issuing cannabis cautions. The officer's response was:

*Dare I say from a manager's point of view ... that [drug detection operations] are not cost effective [and] they're labour intensive.*⁴⁰⁰

Another officer suggested that police:

*... would be far better off putting our money and specifically focussing on problem [truck] companies and offenders we know of in the criminal breach.*⁴⁰¹

The above officer also noted that such a strategy would be less intrusive for the general public:

*Putting aside the labour intensive stuff, any method that just blankets whole areas and just tests everyone is actually quite intrusive ... you got mum and dad and the kids, you've got honest truckies who make up 90 per cent of the trucking population. They're all getting tested, they're all getting jack of it, they just want to move on and get on with their job.*⁴⁰²

5.6.1. Financial costs

Table 4 outlines the NSW Police Force expenditure on the 23 drug detection operations conducted during the review period. The table does not include the cost associated with the handlers such as wages, travel and shift allowances, and vehicle expenses. Nor does it include the costs associated with maintaining the dogs (food, veterinary care, training aids etc).

The total cost of conducting the 23 drug detection operations over 52 days involving 624 police officers and 48 drug detection dogs was in excess of \$300,000. The NSW Police Force made the following observations in relation to the cost effectiveness of drug detection operations:

*Considering the amount of indictable quantities of prohibited drugs/plants seized during operations run to date, it is suggested that [drug detection trial] operations are not cost effective. In terms of a cost-benefit analysis the return for the NSWPF on their investment in these types of operations is not high.*⁴⁰⁴

The NSW Police Force also noted that the number of indictable quantities of prohibited drugs seized 'were not in sufficient quantities to justify the amount of resources required in the planning and execution phases'.⁴⁰⁵

The NSW Police Force also advised:⁴⁰⁶

In regards to Operation Cobwell, conducted in Northern Region, 96 police and 2 shifts were utilised over 2 nights. The approximate cost for wages alone for this operation was \$32,800. This figure does not include meal and fuel expenses. Given the relatively small number and quantity of drug detections the operation was not cost effective.

In regards to an operation in Barrier LAC in Western Region, the attendance of the Dog Unit necessitated two days of travel to Broken Hill followed by two days of travel to return to Sydney. In remote areas travel costs, in particular, tend to make one-off operations cost prohibitive.

The cost effectiveness of applying for and running specific drug detection operations can, in part, be enhanced when operations are run over the course of several days. However, as noted above the cost effectiveness of [drug detection trial] operations is generally considered quite low when factors such as general staffing costs and low drug seizure rates are taken into account.

It is difficult to disagree with the NSW Police Force assessment of the cost and resource effectiveness of the drug detection operations conducted.

5.6.2. Impact of drug detection operations on local policing

In addition to the financial costs incurred during drug detection operations, there is also the opportunity cost, which is the benefit lost from not utilising resources for other purposes such as local policing. It is not easy to quantify the opportunity cost associated with drug detection operations.

One senior officer we interviewed suggested that drug detection operations had an impact on local policing:

*Whilst they're out there at that operation then they can't be deployed into other areas where their core duties lie.*⁴⁰⁷

Table 4. Operational costs

Operation*	Days of operation	No. of officers involved	Base wages (\$)	Operational preparations (\$)	Post operational reporting (\$)	Travelling allowance (\$)	Overtime (\$)	Shift allowances (\$)	Meals (\$)	Equipment hire (\$)	Total (\$)	Total excluding base wages (\$)
1	2	70	27,800	38	-	958	900	2,395	2,960	-	35,051	7,251
2	1	14	5,283	0	0	0	751	0	0	0	6,034	751
3	5	25	8,387	-	-	1,264	4,632	0	40	460	14,783	6,396
4	4	15	12,900	1,341	268	814	3,195	2,580	500	0	21,598	8,698
5	2	17	4,934	0	0	0	1,011	635	0	0	6,580	1,646
6	1	32	6,026	-	-	-	-	228	-	-	6,254	228
7	3	20	6,176	-	-	2,500	1,845	907	-	-	11,428	5,252
8	1	23	5,744	-	-	-	-	786	-	-	6,529	786
9	2	19	9,848	0	-	-	3,295	0	0	0	13,143	3,295
10	2	96	32,800	0	0	0	9,792	3,492	4,200	0	50,283	17,483
11	2	30	15,435	0	-	9,121	0	656	369	0	25,581	10,146
12	2	24	11,723	0	0	0	979	333	0	0	13,035	1,312
13	2	19	5,866	-	39	958	948	2,371	-	-	10,182	4,316
14	2	11	7,502	0	0	0	3,332	898	660	0	12,392	4,890
15	2	32	3,210	-	-	-	-	51	317	-	3,579	369
16	2	20	6,176	-	-	660	1,919	353	27	-	9,134	2,959
17	2	12	2,260	-	-	455	-	-	-	-	2,715	455
18	2	8	1,997	-	-	-	-	100	-	-	2,097	100
19	2	12	6,000	0	0	1,100	1,771	681	0	200	9,752	3,752
20	3	13	8,423	536	268	680	0	1,677	0	0	11,584	3,161
21	3	75	9,607	-	-	1,000	1,919	-	76	-	12,601	2,995
22	2	22	6,070	1,100	200	400	750	314	0	0	8,834	2,764
23	3	15	11,250 ⁴⁰³	-	-	4,030	-	-	-	-	15,280	4,030
Totals	52	624	215,416	3,015	775	23,941	37,039	18,456	9,149	660	308,449	93,034

Source: NSWPF. Note: Cells left blank where the NSW Police Force did not provide any details.

* See Tables 1 and 3 in Chapter 3 for details of the local area command/s that these operation numbers refer to.

However, another senior officer stated:

*We make sure that when we plan for these operations it won't impact on what we call the first response agreement of local area commands and it wouldn't impact on the service delivery for communities.*⁴⁰⁸

The NSW Police Force provided the following response to a question on the impact of drug detection operations on other policing responsibilities:⁴⁰⁹

The financial costs of conducting [drug detection trial] operations are significant and have to be met by individual [local area] commands, unless they can source alternate funding from Operation Viking and other means. The ability to fund other competing operational priorities is a factor to be weighed up when determining the timing and scope of [drug detection trial] operations.

Given the competing demands [drug detection trial] operations were restricted, in at least one instance, to a lone static check point. Sometimes, in order to satisfy First Response Agreement demands, officers are sourced externally from other units and from neighbouring commands. Sourcing large numbers of staff externally has the flow-on effect of reducing the ability of these commands to meet their own policing responsibilities. During Operation Cobwell some of the 'seconded' officers were required at times to leave the site of the [drug detection trial] operation to attend to operational needs within their home command.

An example of opportunity cost is illustrated by the fact that detectives from the criminal investigation units of local area commands participated in the majority of operations. This resulted in detectives conducting searches that usually uncovered small amounts of mostly cannabis.

We asked some senior officers whether detectives issuing cannabis cautions represented an effective use of their time and skills. The senior officers acknowledged that this was not an effective use of resources and suggested that the detectives could have been called to the site of the operation if large quantities of drugs were located.⁴¹⁰

5.7. Other measures of effectiveness

Drug detection operations may produce other less tangible benefits that are not readily quantifiable. Below is a discussion of other factors to be considered in the overall assessment of the effectiveness of drug detection operations.

5.7.1. Frustrating drug traffickers

Drug detection operations aim to detect and/or frustrate the efforts of drug traffickers. As noted above (at paragraph 5.2), drug detection operations conducted during the review period did not result in significant detections of indictable quantities of prohibited drugs.

There was some evidence that drug detection operations inconvenienced some drug couriers. For example, police received information that some drivers were stopping and offloading drugs at certain locations, which they would pick up later.⁴¹¹ However, there was little evidence to demonstrate that operations conducted during the drug detection trial resulted in any sustained frustration or deterrence of drug couriers.

One senior officer we interviewed made the following observation:

*There's no doubt drugs are being conveyed across every highway in Australia. Any police activity on any highway is going to frustrate drug couriers and drug transportation because the more of it the more lengths they need to go to, to either secrete their drugs, go different ways or employ tactics to try and get around police operations, so no matter what it is, any police operation is going to frustrate drug couriers.*⁴¹²

However, another senior officer opined that there is 'no evidence or intelligence that these operations have frustrated the trafficking of indictable quantities of drugs'.⁴¹³

We asked the NSW Police Force if there was any evidence or intelligence holdings suggesting that operations under the Drug Detection Trial Act have been effective in frustrating or disrupting criminal activity involving the trafficking and/or supply of prohibited drugs. The NSW Police Force observed:⁴¹⁴

... the [drug detection trial] operations run to date have been disappointing in terms of results. While static sites may have frustrated some criminal activity for a short period of time the overall effect would appear to be minimal.

The inability of operations run under the [Drug Detection Trial] Act to frustrate or disrupt the trafficking and/or supply of prohibited drugs is illustrated by the fact that indictable quantities of drugs continue to be detected utilising powers under alternate legislation.

5.7.2. Community support

5.7.2.1. Positive feedback during operations

Ombudsman observers regularly heard members of the public stopped at check points voice their support for the police efforts. The Police Association of NSW advised that:

*Information we have received from members indicates that the majority of persons subjected to screening during these operations [were] supportive of the police effort and agree that it is not any way intrusive.*⁴¹⁵

One senior officer we interviewed noted:

*... most people coming through those sites are decent good people and we're getting a lot of feedback from those people saying 'it's great to see you out and about'.*⁴¹⁶

5.7.2.2. Complaints

A search of the Ombudsman and NSW Police Force complaint databases revealed that no formal complaints were received in relation to the conduct of police and/or drug detection dogs during any of the 23 drug detection operations. In addition, the NSW Police Force advised that they were unaware of any formal or informal complaints.⁴¹⁷

5.7.2.3. Section 16 charges

As noted above (at paragraph 2.1.7), section 16 of the Drug Detection Trial Act created three new offences. The NSW Police Force advised that no persons were charged under section 16 during the review period.⁴¹⁸ However, one person was charged with hindering police during a drug detection operation — see case study 10 (at paragraph 4.5).

5.7.2.4. Impact of operations at roadhouses

During the review period, police conducted four operations at petrol station truck stops (also known as roadhouses) targeting heavy vehicle drivers who police believed might have stopped to avoid scrutiny at other check points. The operations varied in duration from 15 minutes to two hours.

As discussed above (at paragraph 4.2.2), these operations were conducted on privately owned land open to the public where drivers can refuel, eat, shower, rest and unwind.

We interviewed the manager of a roadhouse where police conducted an operation. The manager advised that there was some initial confusion about whether police had the power to conduct the operation at the roadhouse. The manager noted that police advised the console operator of their intention to conduct an operation upon arrival at the location.

The manager opined that the operation:

*... was not a good look. ... a lot of people just keep going when they see a lot of police [because] they think something's up. You know if you see a lot of police you think 'Oh well I won't pull up 'cause something's happening'.*⁴¹⁹

The manager, who did not appear to appreciate the police rationale for targeting vehicles stopped at the roadhouse, suggested that police could have conducted the operation at alternate locations:

*... [the police] have got all the places along the highway where the RTA pulls trucks in and that's where I think [operations] should [be conducted].*⁴²⁰

The manager also advised that staff on duty mentioned that 'a lot of trucks kept going that night.'⁴²¹ When asked about the financial impact of the operation on the business, the manager stated:

*To be honest I haven't looked at it but the console operator said that it was usually a lot busier.*⁴²²

The manager also advised that when drivers purchase fuel they could spend between \$500 and \$1,200 and that:

*... you've only got to miss out on four or five trucks and it's a big loss.*⁴²³

In addition, the manager noted that drivers who did not stop because of the police presence would have to travel a further hour to reach the next roadhouse with similar amenities. Furthermore, drivers whose employers provided charge cards to purchase petrol would have to travel a further two hours to reach the next roadhouse as the cards must be used at particular petrol company outlets.

The manager also raised the issue of the potential impact of the operation on the fatigue management schedules of drivers:

... a lot of [drivers] come in and they're tired and cranky and want to sit down and not be bothered and just have a meal and go. They're all on timetables and they've only got half an hour, 40 minutes, you know, to keep their times going.⁴²⁴

Police did not seize any drugs at operations conducted at roadhouses.

5.7.3. What people stopped and searched thought

As noted above (at paragraph 5.7.2.1), police usually received positive feedback from members of the public while conducting operations. However, we note that police did not search a number of people who made positive comments.

We conducted a confidential telephone survey of persons who were stopped and searched by police in order to gain insight into their perceptions of the way police exercised their powers.

5.7.3.1. Methodology

We selected 11 drug detection trial operations (both static and mobile) conducted between November 2007 and January 2008. Using information recorded on the NSW Police Force COPS database, we identified 95 individuals as potential survey participants.

We applied the following eligibility criteria for survey participants:

- they were in a vehicle stopped and screened by a drug detection dog
- the drug detection dog indicated the possible presence of a prohibited substance in relation to the vehicle and/or its occupants
- the vehicle and/or its occupants were searched by police
- no indictable quantities of drugs were seized by police, and
- a contact telephone number was recorded on COPS, or the address details recorded on COPS were sufficiently detailed to allow us to consult the *White Pages* to obtain telephone numbers.

We chose not to contact people who had been charged in relation to the seizure of indictable quantities of drugs, or who had outstanding warrants or other charges pending as we did not want the survey to interfere with any police investigation or court process.

Prior to making phone contact, we contacted potential survey participants by registered post to explain the NSW Ombudsman's role and the reasons for conducting the survey.⁴²⁵ Letters were posted shortly after each operation and provided information about the mechanics of the survey and contact details, should further information be required. We also made it clear that participation in the survey was voluntary and that personal information would be kept confidential.

We sent letters to 95 potential survey participants. Of these, we were able to make telephone contact with 33 individuals.⁴²⁶ Two individuals declined to participate in the survey. A total of 31 persons were surveyed, which represents 6% of all persons stopped and searched by police during drug detection operations conducted during the review period.

At the beginning of each survey, participants were again advised of the voluntary nature of the survey and assured of confidentiality. Participants were asked a series of 12 questions and their comments recorded. In addition to a number of closed questions, participants were asked open questions about their views of the police powers, how they were treated by police, and whether they had any other comments.⁴²⁷

5.7.3.2. Limitations

One limitation of our method was the reliance on COPS data for contact details of potential survey participants. COPS data is not always accurate or up to date, which impacted on us sending registered mail to the current address of the potential participant.⁴²⁸ In addition, we may not have had the current telephone number when attempting to contact the potential participant.

Another limitation is the fact that the persons surveyed only came from six operations, with more than half of the participants (18 of 31) coming from one operation.⁴²⁹

5.7.3.3. Survey participants

Survey participants were aged between 19 and 57 years with an average age of 30. Twenty seven participants were male and four female. Two-thirds (21) were vehicle drivers and the remaining third (10) were passengers.

According to survey participants, three were heavy vehicle drivers, one was a bus passenger and the remaining 27 were either car drivers (18) or car passengers (9).

According to information on COPS, nine survey participants were issued a cannabis caution. One participant was issued a traffic infringement notice and one participant was issued a court attendance notice. Police did not find any prohibited drugs or pursue any other legal action in relation to twenty of the participants.⁴³⁰

5.7.3.4. Survey findings

Explanation and notice

Overall, participants reported that police complied with requirements to provide a verbal and written explanation of the reason for being stopped. All but two participants stated that an explanation was provided. One participant could not remember and one response was unclear.

Twenty six participants (84%) told us that police provided them or the driver with a piece of paper (section 12 notice) explaining the powers.⁴³¹ Three of these participants were given the notice after police completed the screening and/or searching.

Five of the 31 participants (two drivers and three passengers) told us they were not provided with the section 12 notice. Of these, one driver told us that the notice was read to them.

Only one participant who received a notice told us that they did not understand it. A further two participants commented that the notice served little purpose because they received it after the search, or did not have an opportunity to read it.

Screening and searching

All participants' vehicles were screened by a drug detection dog and searched by police. Vehicle searches ranged from the dog and handler searching within the vehicle, to the contents of the goods in the vehicle being taken out and searched.

Twenty nine participants (94%) reported being individually screened by the drug detection dogs. Twenty seven participants (87%) were searched, one of whom had not been previously screened by the drug detection dog. Twenty five of those searched were provided with an explanation for the search. Three participants screened by the dog were not searched, presumably because the dog made no indication.

The person searches ranged from pockets being emptied, clothing patted down, to a strip search.

The length of time that participants reported being detained ranged from 7 to 75 minutes with the average time being 30 minutes. This includes search time and time waiting. One of the participants commented that most of the time was spent waiting.

Participants made the following comments about being searched:

*They put the dog into the truck. Took me aside, patted me down and got me to empty my pockets.*⁴³²

*Dog went around the car, bags, everything in the car was gone through. I had to remove my shoes and socks.*⁴³³

*Stopped the car. Told to open the door. The dog went over the boot and they searched the car. Dog went to my pocket and slobbered all over me. It was intrusive — went up my shirt. I was stripped down — shirt off — it was not private. I only had underwear left on.*⁴³⁴

*They asked me if I would mind if they put the dogs through the cabin — I said it was okay. I was standing outside and the dog was directed to sit next to me — they said that the dog indicated but they told it to sit. Two dogs and four officers searched my cabin. ... this is a new truck and new uniform — I told the police that. The dog left hair everywhere. The truck is my home, I travel from Perth to Sydney, spend a lot of time in my truck. What right have they to come into my home? Dogs could have fleas, diseases. When there's 20 officers standing around, what they say goes. I was stripped naked on the side of the road. I felt pressured to comply. There was five police watching. I had a torch shined on me while I was taking my clothes off.*⁴³⁵

Views about the powers

Most participants (15) were fairly neutral about the use of the powers. Below is a selection of comments:

*I've never used drugs and neither have my mates — I don't know, no problems.*⁴³⁶

*No problem — they're just doing their job.*⁴³⁷

*Doesn't bother me.*⁴³⁸

*They're not too bad — but it was scary for the little one — he's six.*⁴³⁹

Some respondents (10) made negative comments:

*It's your property, you should be able to say no. It's degrading.*⁴⁴⁰

*Ridiculous, appalling.*⁴⁴¹

*There's a lot more serious crime that needs to be targeted. Going for large quantities is good. It should be different — there were at least 15 officers there all day being paid — there's lot's more serious stuff for them to do — it's stupid, a waste of resources and time.*⁴⁴²

*Invasion of privacy, I'm not totally for the powers. What if you're off to somewhere — it's inconvenient and invasive.*⁴⁴³

*I understand that they have to do things but it's not right pulling everyone over.*⁴⁴⁴

Some respondents (6) were more positive:

*Good — great — should be more of it.*⁴⁴⁵

*Got to be done — I understand that.*⁴⁴⁶

*Good thing given the crap that's getting around — like ice, truckies with amphetamines — I am concerned about it. The execution of the powers could save people.*⁴⁴⁷

How police treated participants

Most participants (21) reported that police treated them well:

*Police conducted themselves very well; they were very nice, friendly and explained the powers.*⁴⁴⁸

*Police were good, treated me well, no conflict, no drama.*⁴⁴⁹

*Happy with police, they asked before going through anything.*⁴⁵⁰

Other participants' responses were mixed (7 comments):

*Pretty good. Maybe one or two tagged me as being guilty already because the dog sat next to me.*⁴⁵¹

*One officer was very good; one was a bit in your face.*⁴⁵²

*All right — one joked with me, another was an arsehole to me and my mate.*⁴⁵³

A few were solely negative about their experience with police:

*Police were pretty rude. It's like power goes straight to their heads. I was treated like a criminal.*⁴⁵⁴

*They treated me like I was a liar. They treated my property disrespectfully — spread it out and left it all over the place.*⁴⁵⁵

5.7.3.5. Case studies

The following two case studies illustrate some of the unintended or unexpected impacts of being stopped and searched by police during drug detection operations.

Case study 13

Stopped and searched in community where business located⁴⁵⁶

A local businessman reported being detained for approximately one to one and a half hours. He commented that his vehicle stands out as he uses it to promote his business. The man and his vehicle were searched on the main highway into and out of town. He said that his vehicle was expensive and that the bumper had been scratched and a hole made in a leather seat by the drug detection dog.

The man said he had a number of confidential business documents in the vehicle and police searched where the documents were kept. He was concerned about the confidentiality of his clients being breached, how being detained in a very public place would be perceived by current and potential clients, and how this would impact on his business. He said that he received 25 phone calls from clients and friends asking what was going on.

Case study 14

Delayed by search⁴⁵⁷

A 25-year-old man was on his way to a job interview when he was detained. He told us that a friend was driving him to the interview when they were pulled into the check point. They were detained for about 40 minutes and the vehicle, passengers and driver were searched. No drugs were seized.

As a result of being detained the man was late for the job interview. He said he felt he couldn't tell the prospective employers why he was late and instead told them that he had car trouble. He didn't get the job and didn't know if the reason was his lateness for the interview.

5.7.4. Additional policing activities during operations

In addition to screening vehicles with a drug detection dog, police conducted a range of other activities during drug detection operations. For example, police regularly conducted random breath testing as well as licence, registration, log-book and heavy vehicle compliance checking.

As noted above (at paragraph 3.4.2), police laid at least 12 drink driving charges and issued in excess of 110 traffic infringement notices. A number of other non drug-related offences were also detected during operations.

One senior officer we interviewed noted:

I think if [drug detection operations] don't do anything else it certainly shows that the NSW Police Force are out and about and they've got these massive operations going and they go 'What's going on here?'. ... [However], you can do that without this legislation, you can show there's 100 police doing roadside breath tests.⁴⁵⁸

The NSW Police Force noted the following:⁴⁵⁹

A number of non-indictable drug offences, including traffic infringements, minor drug possessions, cannabis cautions and intelligence reports, have also been detected/generated during [drug detection trial] operations. And any large-scale operations have the potential for reducing road trauma due to a visible police presence.

Whilst the true measure of this specific legislation is the identification and removal from the road of vehicles carrying indictable quantity of prohibited drugs/plants, the inclusion of other benefits, including those described above, in any discussion of the overall effectiveness of these operations enhances their perceived success. However, it is noted that these additional benefits may just as well as have been derived from non-[drug detection trial] related operations.

There is little doubt that any police activity has the potential to detect offences unrelated to the primary purpose of the operation. However, as the NSW Police Force observed, the unplanned peripheral benefits achieved during drug detection trial operations could also have been achieved during other operations, which would have been cheaper and far less resource intensive to conduct.

In addition, high visibility policing activities during drug detection operations have the potential to adversely impact on the primary purpose of the operation given the fact that generally well-organised and sophisticated drug couriers may take evasive action upon seeing or hearing about a highly visible operation (see paragraphs 5.5.1 and 5.5.2 above).

In our view, while noteworthy, the peripheral benefits associated with drug detection operations should be afforded little or no weight in any assessment of extensively planned, cost and resource intensive operations aimed at detecting persons involved in the trafficking of indictable quantities of prohibited drugs given that these benefits could just as easily have been achieved by police conducting ordinary duties such as patrolling highways.

For example, during one mobile operation, conducted over two nights involving 19 police officers and two drug detection dogs at a total cost in excess of \$10,000, police did not seize any prohibited drugs. However, police did detect two persons drink driving and issued two traffic infringement notices.

It is arguable that a highway patrol officer, deployed for the same period of time in the same location may well have achieved the same result without the attendant cost and resource impost. That it to say, it is usually a matter of good luck, rather than detailed planning and execution, that persons were detected committing drink driving and traffic offences during drug detection operations.

5.8. Would further amendments enhance the effectiveness of operations?

The Parliament revived the drug detection trial with the expectation that the amendments would provide police with additional operational flexibility in targeting persons involved in the trafficking of indictable quantities of prohibited drugs.

As noted above (at paragraph 5.4), the anticipated benefits have not been realised despite the dedicated, professional and diligent efforts of police officers involved in the careful planning and execution of drug detection operations.

Police have expressed various views about the utility of further amendments to the legislation. One senior officer stated:

... I just think [the legislation] is not fine-tuned ... the aim of the legislation is good; I just think the way it is applied is impractical.⁴⁶⁰

The Police Association of NSW advised that many police are frustrated by the lack of a specific power to require drivers of heavy vehicles to open their doors and step down from the cabin:

[The] legislation needs to be amended so as to grant power to police, on similar grounds as those relating to RBT operations, whereby once police issue the driver with a [section 12] notice, they are able to order the drivers of heavy vehicles (due to the height of the vehicles) to open their door and then let the dogs walk around the vehicle using their sense of smell — if a scent is detected, police then have reasonable cause to search the vehicle.⁴⁶¹

We asked the NSW Police Force of their view on whether further amendments would be likely to increase or enhance the operational effectiveness of drug detection operations. The NSW Police Force observed:

Legislation permitting police to stop a vehicle for the purpose of drug detection has the potential to be of great operational benefit and effectiveness. However, there is a risk that further amendments to the [Drug Detection Trial] Act would create legal burdens and complexities that might make these types of operations less effective.

The NSW Police Force also suggested that further powers in relation to directing drivers to alight from vehicles would be beneficial:

Further powers enabling the drug detection dogs to enter vehicles, especially well sealed and tall, heavy vehicles for the purpose of drug detection would enhance their effectiveness. Sections 11(2)(e) and (f) severely restrict the efficacy of the dog (no direction to open doors or alight from vehicle) in detecting drugs. Alternately, police could have the authority in the absence of the RTA, to direct the drivers of larger vehicles including trucks, buses and four-wheel drives to alight from the vehicle while the dog samples the air around the vehicle with the doors and/or windows open.

The issue of police having the power to require drivers to open doors and windows of vehicles for screening purposes was raised on a number of occasions.⁴⁶² However, we note that in practice, heavy vehicle drivers almost always alighted from their cabins when stopped at check points. This usually resulted in cabin doors being left open. In addition, Ombudsman observers did not see a single occasion where a car driver did not wind down their window to engage with police when stopped at a check point.

Accordingly, the question that arises is whether amending the legislation to give police additional powers to open doors and windows will actually result in any material difference to the way police conduct operations or the rate of detecting drugs. In our view, it is unlikely that such amendments will overcome the more inherent limitations such as the dissemination of information during operations and the lack of the element of surprise.

We also note that the NSW Police Force response refers to the need for further powers to enter vehicles notwithstanding the fact that police currently have the power to enter the cargo areas of heavy vehicles and the luggage holds of coaches pursuant to section 11(3)(a) of the Drug Detection Trial Act. As noted above (at paragraph 5.5.3), police rarely used the power of entry in relation to heavy vehicles.

In any event, the NSW Police Force opined that:

... compliance with OH&S and other requirements diminishes the obscurity of operations and thus their effectiveness. Notwithstanding any changes to powers concerning drug dogs these requirements may not be able to be readily altered due to other legislative obligations and the general duty of care owed to police and members of the public.⁴⁶³

Saliently, the NSW Police Force expressed the following views in relation to further amendments:⁴⁶⁴

Depending on the nature of any further amendments the cost effectiveness of [drug detection trial] operations would remain unchanged.

... a reduction in costs and resources would only be available if OH&S and other requirements were diminished, a situation unlikely to be effected by further changes to the [Drug Detection Trial] Act.

and:

*Given the lack of the element of surprise, the lack of significant seizures achieved thus far and the effectiveness of conventional police powers [see below at paragraph 5.9.1] it can be argued that there is no cogent argument to pursue extra police powers.*⁴⁶⁵

We agree. In our view, there appears to be little utility in attempting to further refine the legislation. We note that Parliament amended the legislation in an attempt to address some of the limitations noted during the border areas trial. However, these amendments have not resulted in the realisation of the main objective of the legislation, which is the detection of persons involved in the vehicular trafficking of indictable quantities of prohibited drugs.

5.9. Alternate drug detection strategies

As noted above, drug detection operations have had limited success in the detection and/or frustration of persons involved in the trafficking of indictable quantities of prohibited drugs. In addition, police have opined that further amendments are unlikely to increase the effectiveness of operations.

A number of senior police we interviewed suggested that instead of conducting cost and resource intensive drug detection operations that appeared to be of limited value, it might be more appropriate to focus on alternate strategies. For example, one senior officer observed:

*You can use telephone interception, listening devices where you can get specific information on drug couriers, then you can pool your resources targeting particular vehicles or a particular area at a particular time. This is more efficient and it outweighs having to ... stop people who are going from point A to point B, the families in a vehicle, the law abiding people in the trucking industry that are just trying to make a living. [Heavy vehicle drivers] are on tough times in terms of getting between A and B in a particular timeframe. We're pulling them up, we're subjecting them to searching, and we're subjecting them to scrutiny for maybe a very technical logbook defect. ... It's about people's rights as much as it is about law enforcement.*⁴⁶⁶

The officer also noted that utilising these alternate strategies resulted in police obtaining additional evidence to be used for the prosecution of persons involved in serious drug offences. That is to say, police would not only have evidence of the drugs seized — as is the case when police randomly detect a driver in possession of drugs — but would also have some evidence linking the driver to the drugs, which is critical to the success of any prosecution given the need to prove physical control and knowledge of the drugs seized in order to secure a conviction.⁴⁶⁷

We note that the issue of proving 'exclusive possession' hindered police in obtaining successful prosecutions in relation to the two indictable quantities of drugs seized during the border areas trial.⁴⁶⁸

Another senior officer said:

*Police are getting very good with surveillance, undercover operations ... and it's more efficient, you identify the true criminality of an organisation as opposed to just stopping every truck and hoping to get a hit.*⁴⁶⁹

Another senior officer, who noted that the drug detection trial 'rests and falls on the results', suggested that police might achieve greater success if operations were based on specific intelligence gathered as a result of physical or electronic surveillance and controlled operations utilising undercover operatives.⁴⁷⁰

The NSW Police Force made the following comments in relation to adopting a more targeted approach:

*The specific targeting of vehicles and/or individuals may in some instances yield a better result in terms of serious drug trafficking, especially in light of the problems associated with [drug detection trial] operations (for example, driver avoidance and low seizure rates).*⁴⁷¹

It is also worth noting the view of a senior officer attached to the Victorian drug taskforce who suggested that it is very difficult to detect people smuggling drugs in cars and trucks on a random basis. The officer noted that police in Victoria:

*... rely more on being made aware through intelligence that a particular person is bringing in drugs at a particular time in a particular car.*⁴⁷²

The officer also noted that:

*Sometimes vehicles are intercepted at preliminary breath test stations where police become suspicious of the occupants or they're aware drugs are transported up and down the Hume [Highway].*⁴⁷³

5.9.1. 'Good old fashioned' policing

In addition to adopting a more targeted approach to identifying drug couriers, a number of police we spoke to noted that conventional policing methods, such as officers patrolling highways, appeared to be more successful in apprehending drug couriers than drug detection operations. Police noted that the combination of intuition and policing experience enabled officers to target suspect vehicles. For example, one senior officer we interviewed noted:

*... years ago we did these type of operations on targeted vehicles ... there was only ever two police involved where you would just target a particular type of vehicle through your intelligence, stop the vehicle, ask for the log book, do exactly the same as they're doing now and it was quite effective because people just didn't know what was going on.*⁴⁷⁴

Another officer observed:

*... there's been some great detections over the years just by pure luck, by police doing what they do best, you know, talking their way into trucks ...*⁴⁷⁵

The NSW Police Force made the following comment in response to a question about types of law enforcement operations that would be reasonably practicable to conduct for the purpose of targeting the vehicular trafficking and/or supply of indictable quantities of prohibited drugs:

*Random drug testing, heavy vehicle compliance operations and highway patrol taskings are examples of other law enforcement actions that may be used to target the vehicular trafficking and/or supply of indictable quantities of drugs. Observations by police (manner of driving, speech etc) and intelligence gathered at the scene may enable police to escalate the powers able to be utilised once a vehicle has been stopped.*⁴⁷⁶

5.9.1.1. Examples of 'good old fashioned policing' during the review period

The NSW Police Force cite the capacity of conventional policing methods to detect persons involved in the trafficking of indictable quantities of drugs during the review period as evidence of the minimal success of drug detection operations in disrupting and/or frustrating drug couriers.⁴⁷⁷

During the drug detection trial review we came across numerous examples of police seizing indictable quantities of drugs in non-drug detection trial contexts. The following case studies illustrate how police conducting ordinary highway patrol duties seized large amounts of drugs.

Case study 15

Police seize 4.57 kilograms of cannabis during RBT stop⁴⁷⁸

Police stopped a vehicle on a major highway in western NSW to conduct a random breath test. The driver was breath tested and returned a negative reading. The driver produced his licence and police conducted radio checks which revealed information linking the driver to drug supply. While talking with the driver, who appeared nervous, police detected the smell of cannabis emanating from the vehicle. Based on these observations and the drug-related intelligence on the driver, police decided to conduct a search of the vehicle.

Police seized a total of 4.570 kilograms of cannabis secreted in two plastic drums in the boot of the car. The driver was charged with two counts of supply prohibited drug > indictable quantity and <= commercial quantity.

Case study 16

Police seize 140 ecstasy tablets after stopping speeding vehicle⁴⁷⁹

Police pulled over a vehicle detected speeding along a highway in southern NSW. Based on the demeanour of the occupants and the intelligence information obtained from radio checks, police decided to search the vehicle.

Police located a number of items secreted throughout the vehicle including: 29 capsules; 140 tablets believed to be ecstasy; \$5685 in cash; capsicum spray; knuckle dusters; scales and ten mobile phones. The driver was charged with supply prohibited drug; possess prohibited weapon; and goods in custody.

Case study 17

Police seize \$875,000 worth of amphetamine during RBT stop⁴⁸⁰

Police stopped a vehicle in south-western NSW to conduct a random breath test. The test was negative but the driver was unable to produce his driver's licence. Police conducted a radio check which revealed the driver had prior drug convictions. Based on this information and their observations of the driver, police conducted a search of the vehicle.

The search uncovered three plastic bags containing what they suspected to be amphetamine weighing 1748 grams — a large commercial quantity with an estimated street value of \$875,000. Police also located: resealable plastic bags; electronic scales; latex gloves; two bags of glucose (presumably to mix with — or cut — the amphetamine); and three boxes of .22 calibre ammunition. The man was charged with a number of serious drug and non drug-related offences.

Case study 18

Police seize large commercial quantity of ecstasy during RBT⁴⁸¹

Police patrolling a major highway in south-western NSW observed a hire car with a single occupant. Police stopped the vehicle and conducted a breath test which was negative. Police then conducted radio checks on the driver which revealed that he may be involved in illicit drug activity. Upon returning to the vehicle police noticed that the driver was nervous. The driver consented to police searching the vehicle. Police noticed that the driver was shaking.

Police seized two vacuum sealed bags containing ecstasy tablets with a gross weight of 2446.9 grams — a large commercial quantity with an estimate street value of up to \$750,000. Police also seized \$1,650. The driver, who denied any knowledge of the contents of the bag, was charged with supply prohibited drug >= commercial quantity and deal with property suspected proceeds of crime.

The above case studies highlight that police are able to seize large quantities of drugs while performing ordinary duties. This appears to indicate that the detection of persons involved in the trafficking of large amounts of drugs does not require a large contingent of police with drug detection dogs patrolling various areas known for vehicular drug supply. The case studies also demonstrate that police continue to proactively target the vehicular trafficking of indictable quantities of prohibited drugs in the absence of cost and resource intensive drug detection trial operations.

Endnotes

²⁸² See above (at paragraph 4.2.1.1.)

²⁸³ The *Summernats* festival has been described as 'a national celebration of spectacular customised, modified street machines, hot rods, sports compacts, factory muscle cars, and other special interest vehicles [that] can be seen cruising, lined up on show or performing in a variety of exciting events [in Canberra].' <http://www.summernats.com.au/> (accessed on 14 March 2008.)

²⁸⁴ The Hon. John Hatzistergos, Minister for Justice, NSWPD, Legislative Council, 25 June 2003, p.2042.

²⁸⁵ NSW Police Force response to the Issues Document, 28 February 2008, p.3.

²⁸⁶ Police Association of NSW submission, February 2008, p.5.

²⁸⁷ Police Association of NSW submission, February 2008, p.3.

²⁸⁸ Interview C transcript, p.21.

²⁸⁹ NSWPF Post operation assessment report, 7 December 2007, p.5.

²⁹⁰ Interview C transcript, p.18.

²⁹¹ Interview C transcript, pp.19–20.

²⁹² Interview C transcript, p.26.

²⁹³ Interview E transcript, p.3.

²⁹⁴ Police Association of NSW submission, February 2008, p.7.

²⁹⁵ Police Association of NSW submission, February 2008, p.8.

²⁹⁶ Interview A transcript, p.30.

²⁹⁷ Interview A transcript, p.34.

²⁹⁸ Police Association of NSW submission, February 2008, p.1.

²⁹⁹ Interview G transcript, pp.34–5.

³⁰⁰ NSW Police Force response to the Issues Document, 28 February 2008, p.4.

³⁰¹ NSW Police Force response to the Issues Document, 28 February 2008, p.3.

³⁰² NSW Police Force response to the Issues Document, 28 February 2008, p.1.

³⁰³ Interview D transcript, pp.6–7.

- 304 NSW Police Force response to the Issues Document, 28 February 2008, p.3.
- 305 NSW Police Force response to the Issues Document, 28 February 2008, p.5.
- 306 NSW Police Force response to the Issues Document, 28 February 2008, p.3.
- 307 NSW Police Force response to the Issues Document, 28 February 2008, p.3.
- 308 NSW Police Force response to the Issues Document, 28 February 2008, p.2.
- 309 NSW Police Force response to the Issues Document, 28 February 2008, p.2.
- 310 NSW Police Force response to the Issues Document, 28 February 2008, p.2.
- 311 NSW Police Force response to the Issues Document, 28 February 2008, p.1.
- 312 Interview A transcript, p.9.
- 313 NSW Police Force response to the Issues Document, 28 February 2008, p.2.
- 314 Interview F transcript, p.3.
- 315 Interview A transcript, p.29.
- 316 Interview A transcript, p.7.
- 317 Interview A transcript, p.6.
- 318 Interview C transcript, p.2.
- 319 NSWPF Section 15B Report of conduct and results of operation, 17 December 2007.
- 320 Interview E transcript, p.6.
- 321 Interview D transcript, p.5.
- 322 Interview A transcript, p.7.
- 323 Police Association of NSW submission, February 2008, p.6.
- 324 NSWPF Post operation assessment, 7 December 2007, p.3.
- 325 See paragraph 13.7 'Dissemination of information about operations' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.153–6.
- 326 NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, p.154.
- 327 NSW Police Force response to the Issues Document, 28 February 2008, pp.5–6.
- 328 NSW Police Force response to the Issues Document, 28 February 2008, p.6.
- 329 NSW Police Force response to the Issues Document, 28 February 2008, p.5.
- 330 NSW Police Force response to the Issues Document, 28 February 2008, p.5.
- 331 NSW Police Force response to the Issues Document, 28 February 2008, p.5.
- 332 Police Association of NSW submission, February 2008, p.6.
- 333 Interview A transcript, p.12.
- 334 Interview C transcript, p.4.
- 335 Interview C transcript, p.25.
- 336 The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2042. See also, *Police Powers (Drug Detection Trial) Act 2003*, s.11(3).
- 337 See for example, Russell, M., 'Drug runners in the fast lane', *The Sunday Age*, 20 May 2007, p.10.
- 338 Interview C transcript, pp.8–9.
- 339 Interview C transcript, p.7.
- 340 Interview D transcript, p.11.
- 341 Interview E transcript, p.19.
- 342 NSWPF Section 15B Report of conduct and results of operation, 17 December 2007.
- 343 NSWPF Post operation assessment, 7 December 2007, p.5.
- 344 Interview D transcript, p.11.
- 345 Interview F transcript, p.7.
- 346 Police Association of NSW submission, February 2008, p.11
- 347 NSWPF Post operation assessment, 7 December 2007, p.3
- 348 NSWPF Post operation assessment, 7 December 2007, p.3.
- 349 Interview C transcript, pp.10–11.
- 350 See paragraph 12.7.3 'Searching cabins of heavy vehicles' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.126–7.
- 351 NSW Police Force response to request for further information, 28 February 2008, p.7.
- 352 NSW Police Force response to the Issues Document, 28 February 2008, pp.13–14.
- 353 NSW Police Force response to the Issues Document, 28 February 2008, p.14.
- 354 NSW Police Force response to the Issues Document, 28 February 2008, p.14.
- 355 See paragraphs 8.3.5.1 and 8.5.2 in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.84–86.
- 356 Interview A transcript, p.16.
- 357 Interview A transcript, p.32.
- 358 Interview A transcript, pp.15–16.
- 359 Interview C transcript, p.3.
- 360 Interview C transcript, p.17.
- 361 Interview C transcript, p.13.
- 362 Interview C transcript, p.3.
- 363 Steering Committee meeting, 26 February 2008.
- 364 Interview E transcript, p.3.
- 365 Interview A transcript, p.29.

- ³⁶⁶ Interview A transcript, pp.18–19.
- ³⁶⁷ NSWPF Post operation assessment report, 7 December 2007, pp.2–3.
- ³⁶⁸ Interview D transcript, p.9.
- ³⁶⁹ Interview C transcript, pp.7–8.
- ³⁷⁰ Interview A transcript, p.22.
- ³⁷¹ Interview A transcript, p.22.
- ³⁷² Police Association of NSW submission, February 2008, p.8.
- ³⁷³ For further discussion of this issue, see paragraph 12.9.1 'Consultation with the RTA' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.132–3.
- ³⁷⁴ NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, p.2.
- ³⁷⁵ Steering Committee meeting, 26 February 2008.
- ³⁷⁶ Police Association of NSW submission, February 2008, p.4.
- ³⁷⁷ The requirements of the statement are set out in a template in NSW Police Force, *Police Powers (Drug Detection Trial) Act 2003 Standard Operating Procedures*, November 2007, Annexure B.
- ³⁷⁸ Interview A transcript, p.3.
- ³⁷⁹ Police Association of NSW submission, February 2008, pp.6–7. The submission appears to mistakenly suggest the record keeping and reporting requirements were imposed by the Ombudsman. The Ombudsman did not impose any additional record keeping or reporting requirements. He simply requested copies of the records and reports — brought into existence by police complying with their legislative obligations — in order to effectively discharge his legislative obligation to keep under scrutiny the exercise of functions conferred on police officers by the Drug Detection Trial Act. See Appendix 2 for a copy of the Information Requirements document.
- ³⁸⁰ NSW Police Force response to the Issues Document, 28 February 2008, p.2.
- ³⁸¹ Section 15 of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* required police to comply with reporting requirements in s.21 of the *Search Warrants Act 1985* in relation to drug detection warrants authorising border areas trial operations. Section 21 of the *Search Warrants Act* required compliance within 10 days whereas s.15B of the *Police Powers (Drug Detection Trial) Act 2003* requires compliance within 14 days.
- ³⁸² *Police Powers (Drug Detection Trial) Act 2003*, s.10(2).
- ³⁸³ *Occupational Health and Safety Act 2000*.
- ³⁸⁴ Interview C transcript, p.5.
- ³⁸⁵ Operation debriefing form, 21 February 2008, p.3.
- ³⁸⁶ NSWPF Section 15B Report of conduct and results of operation, 21 February 2008.
- ³⁸⁷ Police Association of NSW submission, February 2008, p.9.
- ³⁸⁸ Police Association of NSW submission, February 2008, pp.9–10.
- ³⁸⁹ Interview A transcript, p.15.
- ³⁹⁰ Interview E transcript, pp.25–26.
- ³⁹¹ NSWPF Section 15B report of conduct and results of operation, 21 February 2008.
- ³⁹² Interview G transcript, p.4.
- ³⁹³ NSW Police Force response to the Issues Document, 28 February 2008, p.15.
- ³⁹⁴ Interview A transcript, pp.26–27.
- ³⁹⁵ See paragraph 9.1 'Stationing of drug detection dogs and handlers in different regions' in NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.63.
- ³⁹⁶ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.63.
- ³⁹⁷ NSW Police Force response to request for further information, 28 February 2008, p.3.
- ³⁹⁸ We note that the NSW Police Force now provides drug detection dog handlers with general training aids known as SOKKS, which contain minute quantities of prohibited drugs. The provision of SOKKS to handlers has reduced the need for access to real drugs for training purposes.
- ³⁹⁹ Interview F transcript, p.9.
- ⁴⁰⁰ Interview C transcript, p.15.
- ⁴⁰¹ Interview C transcript, p.16.
- ⁴⁰² Interview C transcript, p.16.
- ⁴⁰³ This figure is an estimate as the NSW Police Force did not provide this information.
- ⁴⁰⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.6.
- ⁴⁰⁵ NSW Police Force response to the Issues Document, 28 February 2008, p.6.
- ⁴⁰⁶ NSW Police Force response to the Issues Document, 28 February 2008, pp.7–8.
- ⁴⁰⁷ Interview C transcript, pp.15–16.
- ⁴⁰⁸ Interview F transcript, p.10.
- ⁴⁰⁹ NSW Police Force response to the Issues Document, 28 February 2008, p.8.
- ⁴¹⁰ Interview D transcript, pp.17–18.
- ⁴¹¹ Interview A transcript, p.23.
- ⁴¹² Interview A transcript, p.23.
- ⁴¹³ Interview C transcript, pp.25–26.
- ⁴¹⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.8.
- ⁴¹⁵ Police Association of NSW submission, February 2008, p.8.
- ⁴¹⁶ Interview D transcript, p.16.
- ⁴¹⁷ Advice from the NSW Police Force, 14 March 2008.
- ⁴¹⁸ Advice from the NSW Police Force, 14 March 2008.
- ⁴¹⁹ Interview B transcript, p.3.

⁴²⁰ Interview B transcript, p.6.
⁴²¹ Interview B transcript, p.2.
⁴²² Interview B transcript, p.3.
⁴²³ Interview B transcript, pp.8–9.
⁴²⁴ Interview B transcript, p.11.
⁴²⁵ See Appendix 5 for a copy of the letter sent to potential survey participants.
⁴²⁶ At least five unsuccessful attempts were made to contact each of the remaining 62 potential participants.
⁴²⁷ See Appendix 6 for a copy of the survey tool.
⁴²⁸ A total of 18 letters sent by registered mail were returned.
⁴²⁹ Operation 21 — conducted by Monaro Local Area Command.
⁴³⁰ Police found a small amount of cannabis in the door paneling of one participant's vehicle. However, no action was taken as the vehicle occupants were unaware of its existence and police intelligence provided an alternative explanation.
⁴³¹ See Appendix 3 for a copy of the Section 12 notice.
⁴³² Survey 18.
⁴³³ Survey 10.
⁴³⁴ Survey 24.
⁴³⁵ Survey 19.
⁴³⁶ Survey 30.
⁴³⁷ Survey 7.
⁴³⁸ Survey 25.
⁴³⁹ Survey 11.
⁴⁴⁰ Survey 15.
⁴⁴¹ Survey 27.
⁴⁴² Survey 24.
⁴⁴³ Survey 17.
⁴⁴⁴ Survey 29.
⁴⁴⁵ Survey 18.
⁴⁴⁶ Survey 23.
⁴⁴⁷ Survey 1.
⁴⁴⁸ Survey 3.
⁴⁴⁹ Survey 23.
⁴⁵⁰ Survey 1.
⁴⁵¹ Survey 25.
⁴⁵² Survey 28.
⁴⁵³ Survey 4.
⁴⁵⁴ Survey 10.
⁴⁵⁵ Survey 15.
⁴⁵⁶ Survey 3.
⁴⁵⁷ Survey 27.
⁴⁵⁸ Interview F transcript, p.19.
⁴⁵⁹ NSW Police Force response to the Issues Document, 28 February 2008, p.9.
⁴⁶⁰ Interview C transcript, p.20.
⁴⁶¹ Police Association of NSW submission, February 2008, p.12.
⁴⁶² It was also raised at the Steering Committee meeting, 27 September 2007.
⁴⁶³ NSW Police Force response to the Issues Document, 28 February 2008, p.7.
⁴⁶⁴ NSW Police Force response to the Issues Document, 28 February 2008, p.9.
⁴⁶⁵ NSW Police Force response to the Issues Document, 28 February 2008, p.7.
⁴⁶⁶ Interview E transcript, p.13.
⁴⁶⁷ See *He Kaw Teh v R* (1985) 157 CLR 523 and *R v Dib* (1991) 52 A Crim R 64.
⁴⁶⁸ For further information, see paragraph 14.6.5 'Proving possession of prohibited drugs' in NSW Ombudsman, *Review of the Police Powers (Drug Detection in Border Areas Trial) Act 2003*, January 2005, pp.172–3.
⁴⁶⁹ Interview E transcript, p.13.
⁴⁷⁰ Steering Committee meeting, 26 February 2008.
⁴⁷¹ NSW Police Force response to the Issues Document, 28 February 2008, p.13.
⁴⁷² Detective Inspector Steve Smith, quoted in Russell, M., 'Drug runners in the fast lane', *The Sunday Age*, 20 May 2007, p.10.
⁴⁷³ Detective Inspector Steve Smith, quoted in Russell, M., 'Drug runners in the fast lane', *The Sunday Age*, 20 May 2007, p.10.
⁴⁷⁴ Interview C transcript, p.6.
⁴⁷⁵ Interview C transcript, p.17.
⁴⁷⁶ NSW Police Force response to the Issues Document, 28 February 2008, p.13.
⁴⁷⁷ See paragraph 5.7.1.
⁴⁷⁸ NSWPF COPS ref: E33495287; H32218828' See also: 'NSW Police find cannabis in boot of car', *Sydney Morning Herald*, 30 October 2007, <http://www.smh.com.au/articles/2007/10/30/1193618851078.html> (accessed on 31 October 2007).
⁴⁷⁹ NSW Police Force, *Police Weekly*, Vol 19 No. 45, 3 December 2007, p.12.
⁴⁸⁰ NSW Police Force, *Police Weekly*, Vol 19 No. 32, 3 September 2007, p.11.
⁴⁸¹ NSWPF COPS ref: E112206397; H35372581.

Chapter 6.

Conclusion

When the new police powers aimed at the vehicular trafficking of indictable quantities of prohibited drugs were originally introduced into Parliament, the NSW Government articulated its desire for an independent, objective, evidence-based assessment of the trial powers.

Our reviews of the Border Areas Trial Act and the Drug Detection Trial Act detail the manner in which police implemented the trial powers; the challenges faced by police exercising the powers; the limitations of the powers; and the results of operations utilising the powers.

This review of the Drug Detection Trial Act focussed on the question of whether the trial powers — which Parliament modified and fine-tuned to provide additional operational flexibility — adequately equipped police with an additional tool to detect and/or frustrate persons involved in the vehicular trafficking of indictable quantities of prohibited drugs, which is the primary objective of the legislation.

A critical examination of the evidence leads to the conclusion that the trial powers are demonstrably ineffectual in assisting police to apprehend drug couriers. It is hard to disagree with the apposite observation of a senior police officer we interviewed:

*... this legislation sounds good but it doesn't work.*⁴⁸²

6.1. Overall assessment of the drug detection trial

6.1.1. Results

During the one-year review period police conducted 23 static and mobile operations over 52 days, involving 624 officers and 48 drug detection dogs, at a total cost in excess of \$300,000.

Seven indictable quantities of drugs were seized during the operations. No 'major' seizures of commercial or large commercial quantities occurred as a result of drug detection trial operations. One seizure involved amphetamine located alongside a garbage bin near a check point and the remaining six seizures occurred as a result of searches of the drivers and passengers of three separate vehicles — a car, a goods van, and a heavy vehicle. No indictable quantities of drugs were located in cargo areas of heavy vehicles.

The rate of finding drugs in all vehicles stopped was 2% (133 of 7,527). The rate of finding indictable quantities of drugs in all vehicles stopped was 0.04% (3 of 7,527). The rate of finding indictable quantities of drugs where one or more drugs were located in a vehicle was 2.3% (3 of 133).

The drug detection trial operations only resulted in a small number of people being detected with drugs and the majority of those involved 'minor possession' offences rather than drug couriers with large amounts of drugs. Of those people detected with drugs, most were in possession of extremely small amounts of cannabis. The most common legal action was the issue of a cannabis caution, which suggests that most people found with drugs had little or no previous contact or dealings with police.

6.1.2. Police conduct

Overall, police conducted themselves professionally during drug detection trial operations. There is no evidence that police exercised the trial powers inappropriately. Ombudsman observers noted that police were generally polite and courteous during their interactions with members of the public. No complaints were received about any aspect of police conduct during operations.

6.1.3. Effectiveness of drug detection trial operations

During the review period of the drug detection trial police demonstrated an unwavering commitment and determination in their planning and execution of operations. Police diligently employed a variety of strategies within the parameters of the legislation with little success. Despite the best efforts of police, anticipated results were not realised.

Our examination of the operations conducted during the review period revealed that the expected operational flexibility was largely unachievable in practice for a number of reasons including the need to ensure the safety of police officers and members of the public, and the availability of drug detection dogs in regional areas for any length of time.

There are also a number of seemingly insurmountable challenges facing police during drug detection trial operations. The rapid dissemination of information about the nature and location of police activities via CB radio and mobile phone networks restricts the 'element of surprise', which is an essential ingredient of any effective strategy targeting organised drug traffickers. In addition, the limited ability of drug detection dogs to accurately detect the scent of prohibited drugs while screening the outside of vehicles seriously undermines the capacity of police to target heavy vehicles involved in the trafficking of drugs.

These fundamental challenges cause us to have considerable reservations about whether drug detection operations, or operations employing a similar methodology, will ever result in the cost-effective detection and/or frustration of persons involved in organised drug trafficking on a sustained basis.

Accordingly, we have not endeavoured to suggest how the legislation may be amended to further enhance operational flexibility or effectiveness, and nor have we attempted to outline how changes in police practice might contribute to greater success. After reviewing the trial powers on two separate occasions, the only possible conclusion that can be drawn is that the powers do not assist or properly equip police to tackle the vehicular trafficking of indictable quantities of drugs as intended.

6.2. Recommendations

	Recommendations
1.	In light of the observations and findings detailed throughout this report, Parliament give consideration to allowing the <i>Police Powers (Drug Detection Trial) Act 2003</i> to expire pursuant to section 23(2) of the Act.
2.	Noting the minimal success of the border areas and drug detection trials, Parliament consider whether there is any merit in continuing to trial the powers given the evidence of their limited utility in assisting police to detect persons involved in the vehicular trafficking of indictable quantities of prohibited drugs.

The NSW Police Force advised that it agrees with the recommendations:

It is the general view of all involved [local area] commands that the restrictions imposed by the legislation made it difficult for police to conduct successful operations during the trial period. The results obtained ... provide overwhelming evidence that this trial has not been cost effective. The NSW Police Force accordingly concurs with both recommendations contained in Section 6.2 of the consultation draft report.⁴⁸³

In addition, the NSW Police Force advised:

Policing of drug transportation is of course an ongoing issue. Accordingly, ... the NSWPF Road Based Drug Trafficking Working Group will continue its work to examine future strategies and enhancements to current practices and procedures in order to address the transportation of prohibited drugs.⁴⁸⁴

Endnotes

⁴⁸² Interview G transcript, p.38.

⁴⁸³ NSW Police Force response to draft final report, 29 May 2008, p.2.

⁴⁸⁴ NSW Police Force response to draft final report, 29 May 2008, p.2.

Appendices

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Appendix 1. Memorandum of Understanding between the Commissioner of Police and the NSW Ombudsman.

MOU between NSW Police and the Ombudsman regarding observational research for the Drug Detection Trial review

Memorandum of understanding (MOU)
between
the Commissioner of Police (NSW Police)
of Pacific Power Building, 201 Elizabeth Street, Sydney NSW 2000
and
the NSW Ombudsman (the Ombudsman)
of Level 24, 580 George Street, Sydney NSW 2000

1. Background

1.1. According to section 22(1) of the *Police Powers (Drug Detection Trial) Act 2003* (the Act), the Ombudsman is required to keep under scrutiny the exercise of the functions conferred on police officers under the Act for a period of 12 months from the date of commencement.

1.2. The Act is expected to commence on 23 February 2007.

1.3. According to section 22(2) of the Act, for the purposes of scrutinising these functions, the Ombudsman may require the Commissioner to provide information about the exercise of those functions; and inspect the records of NSW Police at any time.

1.4. According to section 22(3) of the Act, the Ombudsman must, not later than three months after the expiration of the 12-month review period, prepare a report on the exercise of the functions and furnish a report to the Attorney General, Minister for Police and the Commissioner of Police.

1.5. As part of the Ombudsman's scrutiny function, Ombudsman's officers (observers) will observe police exercising functions under the Act (the relevant police activity).

1.6. This MOU outlines the cooperative arrangements for facilitating the observation by the Ombudsman's officers of the relevant police activity.

2. Responsibilities of NSW Police

2.1. NSW Police will cooperate with the Ombudsman and his observers for the purposes of facilitating their observation of the relevant police activity.

2.2. The responsible Regional Operation Manager, or his or her delegate, will notify the Ombudsman as soon as practicable, via the dedicated mobile phone number for the review (0400 230 249), of details of all planned drug detection operations under the Act.

2.3. The observation of such operations is to be negotiated directly with the relevant commander or leader of the relevant coordinating unit (team leader), subject to the terms of this MOU.

2.4. The relevant commander or team leader will allow the Ombudsman's observers to attend pre- and post-operation briefings (if relevant), and provide copies of operational orders (if relevant) at such briefings.

3. Responsibilities of the Ombudsman

3.1. The Ombudsman and his observers agree to cooperate with NSW Police in facilitating the observation of the relevant police activity.

3.2. The responsibilities of the Ombudsman's observers is set out in greater detail in Schedule 1 of this MOU, *Guidelines for the Ombudsman's Observers* and Schedule 2 of this MOU, *Police Information Sheet*.

3.3. Schedule 1 of this MOU will be given to the observer prior to any observation of the relevant police activity.

3.4. Schedule 2 of this MOU will be given by the Ombudsman to the relevant commander or leader of coordinating unit prior to any observation of the relevant police activity.

4. The term of this MOU

This MOU expires on completion of the Ombudsman's review of the Act.

5. Review and amendment

The terms of this MOU, Schedule 1 or Schedule 2 may require amendment during the review period. Should this occur, amendments will be the subject of consultation between the Ombudsman and NSW Police.

6. Confidentiality

The Ombudsman will maintain the confidentiality of information obtained during observation of the relevant police activity, as required by the *Ombudsman Act 1974* and any other relevant legislation.

7. Indemnity

The Ombudsman releases and indemnifies and agrees to keep released and indemnified the NSW Police against liability for all direct loss, damage, injury and death including injury to or death of an officer of the Ombudsman or damage to property caused or contributed to by negligent or unlawful acts or omissions by an officer of the Ombudsman in conducting observation activities except to the extent that such loss, damages, costs or expenses arise out of the acts or omissions by the NSW Police, its servants and agents.

8. No contractual or enforceable legal relations to arise and relationship with legislation

8.1. Both NSW Police and the Ombudsman expressly agree that this MOU does not create any contractual relations or other legally enforceable obligation between the parties and is not intended by the parties to be enforceable in any court, mediation or arbitration except as may have been set out in this MOU.

8.2. Both NSW Police and the Ombudsman expressly acknowledge that this MOU is not a substitute for any legislation and cannot override any provision in legislation that is inconsistent with this MOU.

Signed on behalf of the Commissioner of NSW Police by his duly authorised delegate:

Name Position

Signature Date

On behalf of the NSW Ombudsman by his duly authorised delegate:

Name Position

Signature Date

Schedule 1 Guidelines for the Ombudsman's observers

Cooperative observational research

As part of monitoring the exercise of powers contained in the *Police Powers (Drug Detection Trial) Act 2003* (the Act), we will be conducting some direct observation of police at checkpoints established under the Act. Police will utilise drug detection dogs to screen vehicles and possibly drivers and passengers stopped at checkpoints.

As a general rule, you should only observe and record police behaviour relevant to the review. More guidance about recording police activity is provided below at paragraph 6.

If the relevant police activity occurs during a police operation, observers will accompany police officers throughout an entire operation, starting with the police briefing and finishing at the end of the operation or police de-brief. One observer may briefly outline the review to police officers at the briefing.

1. Working with police

During the observation of police activity, it is important that you attempt to establish a rapport with the police you spend time with. However, it is preferable that you do not discuss their actions or the specifics of the legislation. You may discuss the Ombudsman's review in general terms. You must try to make the police feel comfortable with your presence while influencing their behaviour as little as possible.

2. Safety

The most important aspect of any observation session is safety. As a rule of thumb, if at any time you feel that you are in or are about to be in danger, remove yourself from the situation. Also, you must follow police safety instructions.

Everyone should bring a mobile phone with them during an observation session. A mobile phone will be supplied if you do not have access to one. You should contact one of the designated emergency contacts if you believe they can help or give you advice.

Prior to any observation session, any particular risks to the observers, police or public safety will be discussed with the relevant commander or team leader, and if relevant they may agree on appropriate action to reduce those risks.

Subject to any agreements made during the discussion between the observer and the commander or team leader, observers will generally adhere to the following:

2.1. observers will position themselves close enough to the police interactions with members of the public to hear and see clearly what is happening – observers will not impede the police in their work nor place themselves or others in any danger

2.2. if a police officer decides that safety risks have increased such that safety is likely to be unacceptably compromised, the officer may give observers instructions to reduce these risks - observers will adhere to any safety instructions by police

2.3. if an observer disagrees with a safety direction, he/she will nonetheless abide by the direction and may choose to discuss any concerns with the operation commander at a mutually convenient time

2.4. if at any time observers feel that their own safety is likely to be or is being unacceptably compromised, observers may opt to leave and must notify a police officer that they are leaving.

3. Dealing with members of the public

You should not attempt to talk to or contact members of the public with whom the police have contact. If you are questioned by a member of the public about the police activity, direct the person to a police officer.

If you *do* need to explain your presence you should keep your explanation brief. It may be sufficient to say that you are an independent observer. If the questioning is persistent, you may need to give your business card to the person and advise them to call you during business hours if they require a more detailed explanation.

Any person who wishes to complain about your presence should be provided with appropriate contact details for the Assistant Ombudsman (Police).

4. Observer de-brief

Observers will meet following each observation session to discuss any difficulties encountered and to address any safety or other concerns that may have arisen. The Assistant Ombudsman will be consulted about any safety or significant policing issues following each observational session.

5. Recording information

As far as is possible it is your job to *describe* what you observe and not to analyse it. If it is not possible to fully observe something or if your observation is cut short, only describe what you do manage to see or hear. If a police officer explains something to you that you did not personally witness (eg after the search an officer tells you what drugs were found) note this down as the comments of the officer not as your own observation.

If you manage to note down a complete quote from a police officer, person of interest or member of the public note this down clearly as a quote. Otherwise it will be assumed that you have paraphrased.

Record information in as unobtrusive a manner as possible. If you are observing a search, it is better to be there from the start rather than attempt to 'move in' on a search already in progress. This is because it may not be clear to the person searched that you are with the police and they may be more likely to question your presence.

You will be required to write up your notes as soon as possible after the observation session. This is usually best done on the first working day after the observation session.

6. Confidentiality

NSW Police has agreed to our observation of relevant police activity on the basis that no information that identifies individual police officers or members of the public will be published. It is important that information about what you see and hear is not discussed outside the Ombudsman's Office or with any police.

It is also important that you do not identify the location or details of the operation to anyone.

General feedback will be given to NSW Police about what we have observed but it will not identify officers and will be centrally coordinated.

In the event that you witness corrupt or criminal conduct you must notify Simon Cohen, Assistant Ombudsman (Police) as soon as possible in the circumstances. Although the project is not set up as a disciplinary or investigative procedure, we have an obligation to act on certain types of conduct.

7. Travel and accommodation

To minimise the possibility that potential offenders may be alerted to the possibility of police activity in small country towns, accommodation will be booked by observers under their own names and will not refer to the NSW Ombudsman. If police require, observers will choose accommodation out of town, or at recommended hotels/motels.

Observers will have their own means of transport and will not be relying on NSW Police for transport.

8. Preparing for observational research

When preparing for an observation session, one observer will use the following as a guide.

8.1. Initial contact with LAC or coordinating unit

After being provided brief information about a particular police operation or police activity by an operational unit, you should contact the LAC or unit to obtain background information about the operation to help you decide whether or not it will be observed. When discussing the operation with the relevant police officer, at a minimum you need to ascertain the following information:

- 8.1.1. LAC or unit
- 8.1.2. the general locality of the operation
- 8.1.3. date
- 8.1.4. start and finish time
- 8.1.5. briefing time and location (if relevant)
- 8.1.6. contact name and number
- 8.1.7. general outline of the scale (approximate number of police and dogs involved) and nature (static, mobile, roving) of the operation
- 8.1.8. any particular safety risks

If necessary you should discuss this information with another researcher within the office and make a decision about whether or not to observe the operation.

8.2. Confirming attendance

If it is decided that the operation will be observed, you must call the relevant police officer to confirm your attendance. At the same time, you should confirm the above details, and:

- 8.2.1. mention you will provide the officer with a copy of the *Police Information Sheet*
- 8.2.2. ask for permission to speak at the briefing (if there is one)
- 8.2.3. ask for copies of relevant documentation (such as operational orders) to be provided at the briefing
- 8.2.4. if necessary, ask about accommodation or parking

8.3. Follow up odds and ends

After you have confirmed our attendance, you should fax or email the relevant police officer to confirm all the details in writing and provide the *Police Information Sheet*. You must also:

- 8.3.1. arrange for two emergency contacts and provide these details to the other observer
- 8.3.2. arrange transport (book car, get cab vouchers or arrange flights and car hire)
- 8.3.3. if necessary, arrange accommodation
- 8.3.4. provide other observers with a copy of these guidelines and obtain their acknowledgment

9. Background information for observers

Prior to observing relevant activity you should:

- 9.1. read the *Police Powers (Drug Detection Trial) Act 2003* and any regulations
- 9.2. familiarise yourself with search powers in the *Law Enforcement (Powers and Responsibilities) Act 2002*
- 9.3. read the Police Information Sheet
- 9.4. read any relevant SOPS that are provided to you
- 9.5. make yourself aware of the details of the designated emergency contacts

10. Overtime/staffing

Overtime or travelling time will be paid in accordance with the *Crown Employees (Public Service Conditions of Employment) Award 2002*. Generally, overtime will be paid at the appropriate rate for any time worked outside bandwidth (ie 7:30 am to 6:30 pm) Monday to Friday or for any time worked on Saturdays, Sundays, or public holidays. You can elect to take leave in lieu rather than being paid for overtime.

In some circumstances travelling time may apply in addition to or rather than overtime.

A staff member who works overtime need not resume duty for at least eight hours. As your safety is of paramount concern, it is recommended that this break be taken. If taking this break means that you commence work in core-time, an appropriate adjustment will need to be recorded on your flexsheet. This adjustment will be recorded as special leave and will not affect your leave entitlements, salary or flex accrual.

The following examples will provide guidance:

Example 1. If you work from 8pm Thursday to 5am on Friday, you should not commence work again until 1pm on Friday. On your flexsheet you will sign on at 1pm and record 4 hours SP in the adjustment column.

Example 2. If you work from 4pm Thursday to 1am on Friday your flexsheet should record you working until 6.30pm. From 6.30pm until the end of your observation shift at 1am you will be paid overtime. You should not resume duty until 9am on Friday morning.

Example 3. If you work from 8pm Friday until 5am on Saturday you will be paid overtime for this period and begin work as usual on Monday.

In rare circumstances your supervisor may direct you to attend work without having an eight-hour break. In these circumstances, overtime rates will continue to apply.

Personnel staff will assist you with overtime, travelling time or with completing your flexsheet.

11. What to bring and wear

As a guide, you should wear comfortable casual clothes. You must bring a notepad and pen, business cards, a mobile phone and make sure you have handy the designated emergency contact phone numbers. If necessary, you should bring sunscreen or a hat and water.

12. Contacts

NSW Police contact: *to be determined prior to each observation session*

Emergency contacts: *designated contacts will be determined prior to each observation session*

13. Acknowledgement

I acknowledge that I have read and understood these guidelines and that I will act in accordance with these guidelines while I am conducting observational research for the NSW Ombudsman.

Name _____ Position _____

Signature _____ Date _____

Schedule 2 Police Information Sheet

Cooperative observational research

As you may already be aware, according to section 22 of the *Police Powers (Drug Detection Trial) 2003* (the Act), the Ombudsman will be monitoring the establishment of checkpoints in 'outer metropolitan areas' at which police will utilise drug detection dogs to screen vehicles and possibly drivers and passengers.

Under section 22, we will be monitoring the exercise of powers under the Act for 12 months. At the end of this period we will provide a report to the Attorney General, the Minister for Police and the Commissioner of Police.

We will use a range of research approaches to ensure that we produce a balanced and comprehensive report about the exercise of these powers. For example, we will be analysing records from COPS and other police records, as well as conducting community consultations, interviews and focus groups and analysing any relevant complaints.

For the purposes of monitoring the exercise of powers under the Act, we have come to an agreement with the Commissioner of Police that we will directly observe police as they exercise these powers. The Commissioner of Police and the Ombudsman have agreed to work cooperatively to facilitate the direct observation of police as they work.

1. The benefit of direct observation

We have already observed the exercise of other police powers for the purposes of monitoring other police powers, such as the use of drug detection dogs in public places.

While valuable information is often obtained by other means, some aspects can only be properly assessed by direct observation.

By accompanying police and directly observing how they use their powers under the Act, we gain information about the 'on the ground' implementation of the Act.

However, we acknowledge that there are a number of factors affecting the purity of this method. For example, the presence of an observer from the Ombudsman's Office may influence, consciously or unconsciously, the behaviour of police. In addition, differences may occur in the way observers interpret and record events.

Measures will be taken to minimise these factors. However, it is unlikely that they can be removed altogether. Notwithstanding the limitations of this method, in our experience observational research has proved to be a valuable source of information about police activities. We will take care to make our observers aware of these limitations and take them into account in our final report.

2. How it will work

It is helpful if officers are given a copy of this information sheet, and also if an observer can speak to officers prior to the observation session (for example, at the operational briefing), to explain the purpose of the research and how observers will conduct themselves during the operation. This will give officers an opportunity to ask any questions they may have.

Prior to any observation session, any particular risks to the observers, police or public safety will be discussed with the relevant commander or team leader, and if relevant they may agree on appropriate action to reduce those risks.

It is of prime importance that the safety of observers, police and members of the public is not jeopardised by the conduct of the research. The above discussion is intended to mitigate the safety risks. However, it is understood that some risks to safety are present in almost any policing activity.

Therefore, subject to any agreements made during the discussion between the observer and the commander or team leader, observers will generally adhere to the following:

- observers will position themselves close enough to the police interactions with members of the public to hear and see clearly what is happening – observers will not impede the police in their work nor place themselves or others in any danger
- if a police officer decides that safety risks have increased such that safety is likely to be unacceptably compromised, the officer may give observers instructions to reduce these risks - observers will adhere to any safety instructions by police
- if an observer disagrees with a safety direction, he/she will nonetheless abide by the direction and may choose to discuss any concerns with the operation commander at a mutually convenient time
- if at any time observers feel that their own safety is likely to be or is being unacceptably compromised, observers may opt to leave and must notify a police officer that they are leaving.

Observers will not initiate contact with members of the public during the operation. Observers have been instructed that if they are questioned by a member of the public, they are to direct the person to a police officer. Police can decide how they explain the presence of the observer. In the past, we have been satisfactorily described by police as 'independent observers'.

Following the observation session, we may look at COPS events and any other relevant records documenting the operation. For example, copies of operational orders, search warrants and warrant applications where relevant.

3. How information will be recorded

Depending on the situation, observers will write notes of activity as it occurs or at the end of an observation session. Observers will *describe* what they observe and not analyse it, and will record it in an unobtrusive manner as possible.

We will not publish any information that identifies individual police officers or members of the public. Anything observed or heard will not be discussed outside the Ombudsman's Office. General feedback will be given to NSW Police about what we have observed but it will not identify officers and will be centrally coordinated.

The observations made are not intended to be used as evidence in any kind of disciplinary action. However, if corrupt or criminal behaviour is observed we are obliged by law to act upon it. If this occurs, the incident will be discussed by the observer directly with the Assistant Ombudsman (Police).

Please note that observers are required to adhere to guidelines which address the above issues of confidentiality, how they should behave and the use of information.

Appendix 2. Information requirements for the drug detection trial review.

INFORMATION REQUIREMENTS FOR THE DRUG DETECTION TRIAL REVIEW

For each drug detection operation or proposed drug detection operation under the *Police Powers (Drug Detection Trial) Act 2003* (the Act), the NSW Ombudsman requires the following:

Please note: The Ombudsman accepts that information from telephone intercepts and listening devices cannot be lawfully provided for the purpose of the review. Any information referring to telephone intercept or listening device material should be blacked out or removed.

Section 6 Application for authorisation

A copy of all applications (whether approved or denied) made to designated officers under section 6 of the Act, including all documents/information provided pursuant to sub-sections (2)(a)-(h) and sub-section (3).

Section 8 Grant of authorisation

A copy of all authorisations granted under section 8 of the Act, including the record of the reasons of the designated officer pursuant to sub-section (5) and any other document/information presented to the designated officer to ensure satisfaction with sub-sections (1)(a) and (b), and (2)(a) and (b).

Section 12 Notices

A copy of all 'types' of notices provided to affected persons.

Section 15 Revocation of authorisation

A copy of all documents/information relating to the revocation of an authorisation.

Section 15B Report on conduct of operation

A copy of all reports prepared pursuant to section 15B of the Act.

Section 16 Offences relating to authorisations

All COPS event, charge and/or information report numbers for section 16 offences.

Section 17 Search records

A copy of all the data referred to subsections (1)(a)-(f), including any COPS event, charge and/or information report numbers and any other information generated as a result of a drug detection operation.

Other information requirements

- A copy of the Operational Orders for each drug detection operation under the Act.
- A copy of the Dog Unit information recording details of the results of drug detection operations under the Act.
- A copy of any documents in relation to the briefing conducted before drug detection operations under the Act.
- A copy of any documents in relation to the de-briefing conducted after drug detection operations under the Act.
- A copy of, or ability to view, any video recording made during drug detection operations under the Act.
- A copy, upon request, of any briefs of evidence prepared as a result of drug detection operations under the Act.
- A copy of any additional information prescribed in the regulations (if any) for drug detection operations under the Act.
- A copy of the Standard Operating Procedures (SOPs) and any amended versions of the SOPs.
- A copy of any additional documents required by the SOPs.
- A copy of any education and/or training material developed for drug detection operations under the Act, including attendance at training sessions.
- A copy of any evaluation or other assessment of drug detection operations under the Act.
- A copy of any correspondence, briefings, minutes or legal advice relevant to the conduct and/or management of drug detection operations under the Act.
- A copy of any arrangements, agreements or correspondence with the Roads and Traffic Authority concerning the implementation or execution of drug detection operations under the Act.
- Information in relation to the cost of drug detection operations under the Act.

Other requirements

- Direct observation, where nominated and pursuant to the Memorandum of Understanding, of the exercise of the powers under the Act, as well as attendance at pre- and post- operational briefings/debriefings.
- Access to operational police to conduct focus groups and interviews.

Appendix 3. Section 12 notice.

NSW POLICE FORCE
Police Powers (Drug Detection Trial) Act 2003

Under the *Police Powers (Drug Detection Trial) Act 2003 (the Act)*, police can apply for an authorisation to set up roadside checkpoints in specified outer metropolitan areas, which police reasonably suspect are being used in connection with the supply of prohibited drugs.

The NSW Police Force have obtained an authorisation under the Act for this area. Pursuant to this authorisation, police may randomly stop vehicles in this area, and screen these vehicles using drug detection dogs.

You have been stopped in accordance with this authorisation, for the purpose of using the drug detection dog to screen your vehicle for prohibited drugs. Under section 12 of the Act, police are required to give you the following information:

NAME OF OFFICER EXERCISING FUNCTION:.....

PLACE OF DUTY:.....

TIME/DATE WHEN FUNCTION EXERCISED:.....

PLACE WHERE FUNCTION EXERCISED:.....

Appendix 4. Sample of an authorisation granted.

AUTHORISATION

Police Powers (Drug Detection Trial) Act 2003

I, **Gary Ronald Worboys**, being a designated officer the meaning of the *Police Powers (Drug Detection Trial) Act 2003*, am satisfied that:

- (1) there are reasonable grounds to suspect that [any part / all] of the search area proposed for the authorisation [is being / is to be], used on a regular basis [for / in connection with] the supply of indictable quantities of prohibited drugs or prohibited plants, and
- (2) the nature and extent of the operation proposed to be carried out is appropriate to the suspected criminal activity, and
- (3) the application has been made in accordance with the provisions of Part 2 of the *Police Powers (Drug Detection Trial) Act 2003*, and
- (4) the proposed search area complies with the provisions of Part 2 of the *Police Powers (Drug Detection Trial) Act 2003*.

In considering the matters referred to in (1) and (2) above, I have given regard to the reliability of the information on which the application is based, and the likelihood of success of the proposed operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes. The reasons for which I am satisfied of the matters set out in (1) and (2) above are:

Significant indictable prohibited drug seizures since June 2005 and reliable police intelligence provides overwhelming evidence that there are reasonable grounds to suspect that the three nominated search areas are being used regularly for the supply of indictable quantities of prohibited drugs. Police Intelligence also supports the reasonable suspicion. Based upon all the information contained within the application and supporting documents I am satisfied that the extent of the operation is appropriate for the criminal activity.

Pursuant to section 8 of the *Police Powers (Drug Detection Trial) Act 2003*, I hereby grant an authorisation authorising the exercise of powers conferred by that Act in connection with a drug detection operation in the following search area, namely:

AREA 1 – Sturt Highway, Hay.

Area 1 is the Heavy Vehicle Inspection Bay Sturt Highway, Hay. The area is a RTA truck stop on a single carriageway, tar road with a 100kph speed limit that can be reduced through signage to 40kph. The area is a main highway in an outer metropolitan area and is 5 square kilometres in size. Refer to Map titled Authorisation Area 1.

*The area has the centre point coordinates LAT 34.508002 LONG 145.714147.
The North East border is defined by coordinates LAT 34.508002 LONG 145.689741.*

The North West border is defined by coordinates LAT 34.508002 LONG 145.714147.

The South West border is defined by coordinates LAT 34.528111 LONG 145.714147.

The South East border is defined by coordinates LAT 34.528111 LONG 145.689741.

AREA 2 – RTA Rest Area No 241.

Area 2 is a RTA rest area on the Sturt Highway, Ravensworth 55 kilometres west of the township of Hay. The area is a rest area on a single carriageway, tar road with 110 kph speed limit. The area is a main highway in an outer metropolitan area and is 5 square kilometres in size. Refer to map titled Authorisation Area 2.

*The area has centre point coordinates LAT 34.618333 LONG 144.284167.
The North East border is defined by coordinates LAT 34.608238 LONG 144.296389.*

The North West Border is defined by coordinates LAT 34.608238 LONG 144.271954.

The South West Border is defined by coordinates LAT 34.628346 LONG 144.271954.

The South East Border is defined by coordinates LAT 34.628346 LONG 144.296389.

AREA 3 – RTA Rest Area No 256.


Area 3 is a RTA rest area on the Sturt Highway, Hellsgate 68 kilometres west of the township of Hay. The area is a rest area on a single carriageway, tar road

with a 110 kph speed limit. The area is a main highway in an outer metropolitan area and is 5 square kilometres in size. Refer to map titled Authorisation Area 3.

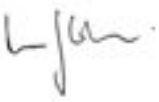

*The area has the centre point coordinates LAT 34.651944 LONG 144.154.167.
The North East border is defined by coordinates LAT 34.64189 LONG 144.16647.
The North West border is defined by coordinates LAT 34.64189 LONG 144.142025.
The South East border is defined by coordinates LAT 34.661998 LONG 144.16647.
The South West border is defined by coordinates LAT 34.661998 LONG 144.142025.*

This authorisation will end at 8am on the 14th of December 2007

The authorisation is subject to the following conditions: Nil


[Designated Officer]
1-15pm 10/12/07.
[Time/date]
Workdays

Appendix 5. Initial letter sent to survey participants.

<p>Contact: Joan Gennery Telephone: (02) 9286 1017</p> <p><salutation> <first name> <last name> <Address 1> <Address 2> <Address 3></p> <p>Dear <salutation> <last name></p> <p>Ombudsman survey of police power to randomly stop and search vehicles for drugs</p> <p>The NSW Ombudsman is an independent watchdog agency that has been asked by Parliament to look at how police are using a trial power which allows them to randomly stop vehicles in outer metropolitan areas and use sniffer dogs to detect prohibited drugs.</p> <p>As part of our research into how police are using the power, we are contacting people who have been subjected to the use of the power. You have been contacted because we understand that you were driving, or were in a car randomly stopped by police in the [insert name] area recently.</p> <p>A person from this office will telephone you during the week beginning Monday, the 3rd of December 2007 to see if you would be willing to participate in a short phone survey to tell us about your experience of being stopped by police. The survey should only take between 5 and 10 minutes to complete. You will be asked a few short questions about what occurred when police stopped you and what you thought about the way police conducted their duties.</p> <p>I would like to emphasise that your participation in the survey is completely voluntary. Any information you give us will be treated with confidence and will not be passed onto police. The purpose of seeking your views is to find what you think about the way police are using the trial power and how it affected you. We may use the information you give us in a report. However, you will not be identified in any way – your identity and any responses you give us will remain completely anonymous.</p> <p>We will not talk to any other member of your family or household about the survey when we call you. We have sent you this letter by registered post to make sure that you are personally aware of the fact that we will be calling you about the survey.</p> <p>If you have any questions or concerns about the proposed survey, please contact Joan Gennery on 9286 1017 or jgennery@ombo.nsw.gov.au. If you are calling from outside the Sydney metropolitan area, please feel free to use our Toll free number 1800 451 524 between 9am and 5pm and ask to be put through to Joan. You are also welcome to contact Joan to arrange a time suitable to you to do the phone survey.</p> <p>I appreciate your consideration of our request, and hope that you will agree to participate in the short phone survey.</p> <p>Yours sincerely</p> <p></p> <p>Simon Cohen Assistant Ombudsman (Police)</p>	 NSW Ombudsman Level 24 580 George Street Sydney NSW 2000 Phone 02 9286 1000 Fax 02 9283 2911 Tollfree 1800 451 524 TTY 02 9264 8050 Web www.ombo.nsw.gov.au
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DRUG DETECTION TRIAL SURVEY QUESTIONS

Introduction

Introduce yourself — name, organisation. Confirm receipt of letter — survey will take approximately 5-10 minutes.

The NSW Police Force is trialling powers that allow them to randomly stop vehicles in outer metropolitan areas and use sniffer dogs to detect prohibited drugs. We are an independent agency that is required to review these powers and report to Parliament. We are looking at such things as when the powers are used and how the powers are used. One part of our review is to survey those who have been subjected to the use of these powers.

We obtained your contact details as a person that was in a vehicle stopped by police using these powers on [date and location]. Your details were obtained through our independent access to the police computer system. Your details and responses will remain confidential and anonymous and will not be passed onto police. Responses from the survey may be used in our report, but again no identifying details will be used.

Questions

As you were in a vehicle that was randomly stopped using the Drug Detection Trial powers, I'd like to ask you a few questions about this.

1. Were you the *driver* or a *passenger* in the vehicle that was stopped? **(circle)**
2. Did the police explain why the vehicle had been stopped? **Yes/No**
3. Were you (or the driver) given a piece of paper (section 12 notice) explaining the powers the police were using? **Yes/No**
If yes:
Did you read and understand what was written on the piece of paper? **Yes/No**
4. Did a sniffer dog go around the vehicle? **Yes/No**
5. Were you also sniffed? **Yes/No**
6. Were you or the vehicle searched? **Yes/No**
7. Did police explain to you why you and/or the vehicle were being searched? **Yes/No**
8. Can you tell me briefly about the search?
9. Can you remember approximately how long it was from the time you were stopped until you were allowed to leave?
10. Having been subjected to these powers — what do you think of them?
11. What do you think about the way police treated you?
12. Is there anything you would like to add?

Glossary

Border Areas Trial Act	<i>Police Powers (Drug Detection in Border Areas Trial) Act 2003</i>
Border areas trial	The trial conducted pursuant to the Border Areas Trial Act
CB radio	Citizens Band Radio
COPS	Computerised Operational Policing System (NSW Police Force)
Drug Detection Trial Act	<i>Police Powers (Drug Detection Trial) 2003</i>
Drug detection trial	The trial conducted pursuant to the Drug Detection Trial Act
FCAN	Field Court Attendance Notice
LAC	Local Area Command
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
MOU	Memorandum of Understanding
NSWPD	New South Wales Parliamentary Debates (Hansard)
NSWPF	NSW Police Force
OH&S	Occupational Health and Safety
RBT	Random Breath Testing
RTA	Roads and Traffic Authority
SOPs	Standard Operating Procedures
'the review period'	23 February 2007 to 22 February 2008

Acknowledgments

This report was researched and written by Les Szaraz with assistance from the following Ombudsman staff: Joan Gennery, Aimee Tan, Peter Burford, Maria Akrivou, Emma Koorey, David Snell, Kym Chapple, Tom Millett, Ayishah Ansari, Tim Lowe, Greg Andrews and Simon Cohen.

We would like to thank the NSW Police Force for providing information and assistance for this review. Particular thanks to all of the officers that facilitated our attendance as observers during operations and provided us with their frank and honest assessments of the trial powers.

We would also like to thank the Police Association of NSW for their submission and the individuals who provided information during interviews and surveys.

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